TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1939

No. 18

HAROLD F. SNYDER, PETITIONER,

vs.

CITY OF MILWAUKEE

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN

PETITION FOR CERTIORARI FILED MARCH 15, 1939.

CERTIORARI GRANTED APRIL 17, 1939.

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INDEX.

[fol. 1]

IN SUPREME COURT OF WISCONSIN, AUGUST TERM, 1938

No. 158

CITY OF MILWAUKEE, Plaintiff and Respondent,

vs.

HAROLD F. SNYDER, Defendant and Appellant

Case—Filed August 19, 1938

STATEMENT ON APPEAL

This is an appeal from a judgment of the Circuit Court of Milwaukee County, Hon. Charles L. Aarons, Judge presiding, finding the appellant guilty of a violation of a city ordinance of the City of Milwaukee, which prohibits the distribution of handbills and other printed matter on the public streets, and in public places in the City of Milwaukee.

[fol. 2] Docket entry District Court, Milwaukee County.
Affidavit of prejudice of City of Milwaukee.
Notice of appeal by City of Milwaukee.
Affidavit for appeal to Municipal Court.
Notice of City of Milwaukee of appeal to Municipal Court.
Clerk's certificate.
Docket entries Municipal Court, Milwaukee County.
Affidavit for change of venue.
Cover.
Certificate of clerk on change of venue.

IN CIRCUIT COURT OF MILWAUKEE COUNTY

MEMORANDUM DECISION

Each of the defendants was charged with violation of Sec. 865 of the Milwaukee Code. (A copy of this section is attached to this Memorandum.) The District Court of Milwaukee County dismissed all of the cases, apparently on the ground that the ordinance (Sec. 865) is unconstitutional in so far as it attempts to make unlawful the distribution of

handbills. The City of Milwaukee has taken these appeals from such determination.

By stipulation the filing of formal complaints was waived. A trial de novo of the Snyder case was had in this court. Each of the other cases was submitted upon stipulation that the facts in each were substantially the same as in the [fol. 3] Snyder case, and that the decision of this court in the Snyder case should govern the decision in all the other cases.

The evidence is undisputed and is to the following effect: On April 27, 1938, the defendant (Snyder) stood at or near the Shinner Meat Market at 1306 W. Vliet street, and distributed handbills to pedestrians on the street. The contents of the handbills pertained to a labor dispute with the Shinner Meat Market, the defendant acting in the capacity of a picket. Many of the handbills were thrown into the street by the persons to whom they were thus distributed. As a result there were numerous handbills in the gutter, some in the safety zone and some were run over and were sticking to the rails of the street car track. The police officers did not arrest any of the pedestrians who had received the handbills from the defendant and who threw them away. This was in accordance with a policy of the police department to the effect that whenever the distribution of handbills results in the littering of the streets the one who is "the cause," that is, the one who passes out the handbills, is arrested.

It is contended by defendant's counsel that the portion of the ordinance which makes unlawful the circulation or distribution of handbills, etc. (i. e., the part in bold face type in the annexed copy), is an attempt to abridge the right of the defendants to freely publish their sentiments—a right guaranteed by Sec. 3 of Art. I of the Wisconsin Constitution; that it is likewise in violation of the defendants' rights [fol. 4] concerning freedom of speech and of the press protected by the first and fourteenth amendments of the U. S. Constitution. Defendants' counsel strongly rely upon the decision of the Supreme Court of the United States in Lovell v. City of Griffin, 82 L. Ed. (Adv. Op. No. 13, p. 660, decided Mar. 28, 1938.) The City Attorney relies upon the decision of the Wisconsin Supreme Court in City of Milwaukee v. Kassen, 203 Wis. 383 (decided in 1931).

1. The decisions in these two cases are not in conflict. They are based upon ordinances which differ widely in con-

tent, scope and purpose. The Griffin ordinance is an outright prohibition of every kind of "literature" regardless of form—whether leaflets or books. In every case the distribution is termed a "nuisance." The Milwaukee ordinance, as construed by the Wisconsin Supreme Court, is applicable only to matter printed in a certain form, such as handbills, cards, dodgers, etc., which are easily blown about on the streets. The Griffin ordinance deals in a "broad sweep" with the distribution of every kind of literature and contains no reference to the evil of throwing waste substances on the streets. The opinion of Chief Justice Hughes specifically points out that it is not limited to "the misuse or littering of the streets." The Milwaukee ordinance appears in Sec. 865 under the heading "Throwing filth, rubbish or nauseous substances on streets," etc. That section is contained in Article 16, headed "Garbage, Rubbish, Nauseous Substances and Odors." Article 16 is in Ch. 17 of the Code entitled "Health." (As to consideration of headings [fol. 5] of sections in interpreting a statute see Knowlton v. Moore, 172 U. S. 41, 44 L. Ed. 969, 978.)

The terms of Sec. 865 (in the light of these headings) make it clear that the purpose is not to prohibit the distribution of handbills except under circumstances when such distribution would be likely to cause an accumulation of waste material in the streets. If that were not true there would be no reasonable explanation for the position (in the section) of the sentence pertaining to handbills, etc. (See Corstvet v. Bank, 220 Wis. 209, 220.) That such is the purpose of the Milwaukee ordinance has been expressly decided by the Wisconsin Supreme Court. Milwaukee v. Kassen, 203 Wis. 383, 384, 385, 388.

Perhaps more vital than any other distinction is the one that in the Griffin ordinance the determination as to whether literature was to be distributed was placed entirely in the hands of a censor—the city manager. No standard was set up under which his acts were governed. He might grant a permit in one case though the street be littered with advertising circulars, and deny it in another where literature of any kind (books, for example) was distributed. The Griffin ordinance, as stated by Chief Justice Hughes, "Strikes at the very foundation of the freedom of the press by subjecting it to license and censorship." It was held "invalid on its face."

The Milwaukee ordinance, as construed by the Wisconsin Supreme Court, instead of delegating to a censor the authority to determine what may be distributed, lays down a standard by which the Court, in each case, must be guided. [fol. 6] The application of that standard does not operate to arbitrarily forbid the distribution of literature of any type or character of content. It forbids only the distribution of paper in the form of handbills, etc., in such quantities and under such conditions as are likely to cause an unsightly accumulation of waste paper and a littering of the streets. Milwaukee v. Kassen, 203 Wis. 383, 385, 388. Mr. Justice Wickhem there quotes with apparent approval from In re Anderson (Neb.), 96 N. W. 149: "It has no reference to or connection with freedom of speech or of the press; and its plain purpose is, not to interfere with the publication of sentiments and opinions of individuals, but to promote the cleanliness and safety of the municipality" (id. 386).

There cannot be any substantial doubt that the Milwaukee ordinance, with the construction given it by the Wisconsin Supreme Court, does not infringe upon the constitutional rights of free speech and free press. This appears to be conceded by defendants' counsel, for he says (in his brief of May 18, p. 2): "it is clear from the Kassen case that our Supreme Court would even prior to the decision of the U. S. Supreme Court have held the ordinance invalid if it had not been assumed and stipulated that the purpose was the legal one of preventing littering of the streets."

It is true that the Court (in the Kassen case) said that both parties had conceded that such was the purpose of the ordinance. Obviously that concession had to be made, for, as the Court points out (p. 384) such construction had been previously made by the Court in Mittelman v. Nash Sales, [fol. 7] Inc., 202 Wis. 577. That the Court (in the Kassen Case) did not rest its position on the concession of the parties plainly appears from the discussion in the opinion of Mr. Justice Wickhem (id. pp. 384-388).

It further appears that, nothwithstanding concessions of validity, the Court expressly ruled in favor of the constitutionality of the ordinance, as interpreted (id. top of p. 386). Such ruling is generally accepted where the ordinance is manifestly intended to keep the streets clean (cf. 22 A. L. R. Note, p. 1484 et seq.)

2. If it be assumed, as defendants' counsel contends, that the case of Lovell v. Griffin (supra) is essentially in con-

flict with the construction of the ordinance and the ruling on its validity in Milwaukee v. Kassen (supra), what must be the ruling here?

The answer has been made repeatedly and consistently by the Supreme Court of the United States to the following effect:

"The general rule is that the construction (of a state statute) given by the highest state court is conclusive on the Supreme Court of the U. S. where the question involved is whether such statute is repugnant to the federal constitution; and when such interpretation renders it constitutional and valid legislation it will not be disregarded by the U. S. Supreme Court, and a different construction given to the statute which will make it repugnant to the federal constitution" (6 Ruling Case Law, 86 [Const. Law, Sec. 85]).

[fol. 8] To the same effect: Marine Nat. Exch. Bank v. Kalt-Zimmers Mfg. Co., 293 U. S. 361, 79 L. Ed. 427, 432; Bandini Petroleum Co. v. Superior Ct., 284 U. S. 8, 78 A. L. R. 826, 833; Wolff Packing Co. v. Court of Ind. Rel., 262 U. S. 522, 27 A. L. R. 1280, 1290; Pierce Oil Corp. v. Hopkins, 264 U. S. 137, 68 L. Ed 593, 596; C. M. & St. P. R. Co. v. Risty, 276 U. S. 567, 72 L. Ed. 703, 707; 27 R. C. L. 44-46 ("U. S. Courts," Sec. 50) citing many cases.

These cases amply demonstrate that in the case of the particular ordinance before the Court, the Supreme Court of the United States is, in any event, bound to follow the construction given to it by the Supreme Court of Wisconsin.

3. The Wisconsin Supreme Court has decided that this ordinance applies generally to the distribution of all printed matter in the form (regardless of contents) of circulars, handbills, etc.—which, "when circulated and distributed upon the streets constitute a well-recognized source of public annoyance by the littering of the streets." (203 Wis., p. 385.) Under that decision the fact that the contents of the circular pertains to political or economic questions, or to labor disputes, is immaterial. It is the form of the leaflet and the facility with which its distribution on the highway usually results in the cluttering up of waste material on the streets, which is prohibited, not the contents. Hence the contention that Sec. 103.53 (e) (in the Wis. Labor Code) creates an exception cannot be sus-

tained in the light of the Court's comments in the Kassen Case (p. 385).

[fol. 9] 4. The further contention is made by defendants' counsel that the proof shows that the ordinance in question is being enforced in an unreasonable and discriminatory manner. In that connection reference is made to the closing statements of the Court in its opinion in the Kassen Case (pp. 388-389), wherein the Court points out that a different question would be presented if the enforcement of the ordinance were shown to be directed at a class of persons for the purpose of suppressing the full expression of their views. Citing the case of Yick Wo v. Hopkins, 118 U. S. 356, 30 L. Ed. 220.

The only evidence upon which this contention is based is the testimony of the police officer and the deputy inspector of police to the effect that in cases where circulars or handbills are littering the streets, the policy of the police department is to arrest the one who is "the cause"—the distributor—rather than the passerby who, after being handed one of these leaflets, tosses it into the street. The testimony is clear that no one is arrested for distributing except in cases where the papers distributed are observed to be littering the streets.

This evidence does not show that the enforcement of this ordinance is being directed "at a class of persons for the purpose of suppressing the full expression of their views rather than for the purpose of preventing the littering of the public streets" (quotation from Kassen Case id. p. 389); or that the ordinance is being enforced in an unreasonable manner.

[fol. 10] While it should not be implied that one who throws paper on the streets is not a violator of the ordinance, yet when one considers the difficulty of enforcing the ordinance in so far as it applies to the throwing of paper on the street by pedestrians, as compared to a method of enforcement which seeks to reach the source, it cannot well be said that there is anything so unreasonable and discriminatory in the enforcement as to meet the condemnation of the Court as stated in the case of Yick Wo v. Hopkins, 118 U. S. 356, 30 L. Ed. 220, 227. There an ordinance pertaining to the regulation of laundries was admittedly enforced only against the Chinese. The Court held that the unjust discrimination constituted a "denial

of equal justice" within the prohibition of the Constitution. In a later case the U. S. Supreme Court said on this subject: "No latitude of intention should be indulged. There should be certainty to every intent. * * * This is a matter of proof (that the law is discriminatory by the manner of its administration) and no fact should be omitted to make it out completely." Ah Sin v. Wittman, 198 U. S. 500, 49 L. Ed. 1142, 1146.

No claim is here made that there is any discrimination as to any known class or group of persons against whom the ordinance is enforced. The discrimination, if any, is against the greater offender, or the one who makes it possible for others to offend. The fact that persons receiving the circulars on the street—frequently taking them reluctantly—who throw them away, are not prosecuted because of the known difficulty of successful enforcement as [fol. 11] to an offense caused proximately by the distributor, can scarcely be deemed an analogous situation to that disclosed in the Chinese laundry case above cited.

For the reasons above stated the ordinance in question is a valid ordinance. The evidence as to the violations of the ordinance here involved being undisputed, the judgments (of the District Court) of dismissal in each of the cases and as to each of the defendants is reversed. The defendants and each of them are found guilty of a violation of the ordinance in the respect outlined above. The Court will hear counsel for both parties in respect to the penalty.

Chas. L. Aarons, Circuit Judge.

Dated May 24, 1938.

(From Article 16 of Ch. XVII ["Health"] of the Milwaukee Code)

Article 16 is headed: "Garbage, Rubbish, Nauseous Substances and Odors."

Sec. 865 is headed: "Throwing filth, rubbish or nauseous substances on streets," etc., and reads as follows:

"It is hereby made unlawful for any person, firm, or corporation, or for any officer, member, agent, servant or employe of any firm or corporation to place, throw or leave any slops, dirty water, or other liquid of offensive smell, or other nauseous or unwholesome, or any dead carcass, [fol. 12] carrion, meat, fish, entrails, manure or other nauseous or unwholesome matter or substance, or any

rubbish, ashes, paper, dirt, stones, bricks, manure, tin cans, boxes, barrels, or other substances whatsoever, *or to circulate or distribute any circular, handbills, cards, posters, dodgers or other printed or advertising matter,* or to drain or pour or to permit to drain or flow oil, kerosene, benzine, or other similar oil or oily substance or liquid, in or upon any sidewalk, street, alley, wharf, boat landing, dock or other public place, park or ground, within the city of Milwaukee. Provided, however, that this section shall not apply to any garbage, manure, ash boxes or receptacles, which are built and maintained not less than twelve inches above the grade of the alley, nor more than three feet from the line of any lot or parcel of land abutting upon any alley in said city. Said boxes so built and maintained shall be waterproof, and shall at all times be kept securely covered except when depositing or removing the contents therefrom."

In Circuit Court of Milwaukee County

Judgment

It is adjudged, that the defendant be and he is hereby found guilty of the violation of the ordinance in question and a fine of $1.00 and costs is hereby imposed and in default of the payment of said fine he shall be imprisoned in the House of Correction of Milwaukee County, Wisconsin, for a period of thirty (30) days. Ten-day stay granted. [fol. 13] Dated at Milwaukee, Wisconsin, this 24th day of May, A. D. 1938.

By the Court.

Chas. L. Aarons, Circuit Judge.

Cover, bill of exceptions.
Stipulation on bill of exceptions.
Index of witnesses.

In Circuit Court of Milwaukee County

Bill of Exceptions

John Kuczkowski, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct examination:

I am a member of the Milwaukee Police Department, and was a Milwaukee police officer on the 27th day of April of

this year. I was on duty on that day, and had occasion to observe the activities of the defendant. That was at about 12:10 on the 27th of April, 1938. We were cruising in the regular patrol car, going west on Vliet street. We observed two pickets in front of the Shinner's Meat Market, which is located in the City and County of Milwaukee at 1306 West Vliet street. We observed these two pickets in front of the meat market there. One was distributing handbills. We drove a little ways and we went to the curb and were watching them. We noticed a lot of people in the street; and the [fol. 14] pickets noticed us there, and they kept on distributing the bills. We were there about 20 minutes, and finally got out of the car. We picked up four of these pamphlets which were lying in the street, across the street, between the safety zone and the sidewalk. The market is located on the north side of Vliet street, and the pickets were marching in front of the store. This defendant, Harold Snyder, was one of the pickets, and he was the only one who was distributing these handbills there. These handbills were lying across the street, right in front of the J. C. Penney store, 1301 West Vliet street, and these four handbills are the ones I picked up.

The Court: I don't suppose the content of the handbills makes any difference either.

Mr. Zeidler: No, it does not make any difference what the handbills attempt to say.

Mr. Richter: It makes some difference here.

Mr. Zeidler: We don't care what they say.

The Court: I will receive them. If there has not been a sufficient connection between the defendant Snyder and the distribution or throwing around of these handbills, that may be testified to later, but they may be marked as "Exhibits 1, 2, 3 and 4."

The Witness: I was stationed in the squad car observing the movements of this particular picket, Harold Snyder, for about 20 minutes. As we observed them, the pedestrians were going by, and he would hold them right out and hand them to them. We noticed one or two that did go by there and asked for them, but most of them he would hand to them. [fol. 15] The Court: Who do you mean by "he"?

The Witness: We then left this one spot, on the north side of Vliet street, and went over to the corner and parked on the opposite side, that is, the south side of Vliet street, and

we got a better view of it. We noticed these people as they got the handbills; some of them would cross the street, wait for the street car, and they would throw them down in the street.

The handbills which had been given to them by this defendant, they would throw them into the street, and we waited there I would say for about twenty minutes, and then we went over and picked up four of those handbills while Mr. Snyder was watching us pick them up.

The Court: Are those the four?

A. Yes.

Those were the four I observed people dropped to the pavement, they were the ones lying thereon. Whether they were the ones or not—there was a lot more there, but I picked those four. The area over which these handbills were lying on the pavement, was about a quarter of a block, covered the intersection of North Thirteenth street, up to about 100 feet west of Thirteenth street. There were probably about thirty or forty handbills picked up, something like that. All we have picked up are those four.

The Court (Q.): There were thirty or forty there, but you picked up only four?

A. Yes, that is all. We could have picked up thirty or forty.

This other police officer with me was Patrolman Henry [fol. 16] Retzer; we were both in uniform. The reason Mr. Snyder and the rest of these people marchin in front of the meat market, I imagine there is some trouble of some kind there, some labor dispute of some kind. That is probably the reason they were picketing there. I imagine the pamphlets were being distributed to state the cause of the pickets. There were two pickets thereof. The automobile traffic conditions on Vliet street at the time and place in question, was not very heavy. On Vliet street there is a street car line going in an easterly and also in a westerly direction —street car rails on the street. There is asphalt pavement on Vliet street at that point in question, and it was dry. There was a wind at the time.

We really noticed that on account it happened to be a windy day, the paper was flying around in that vicinity at the time. I did not get any handbills from this defendant, Harold Snyder. He did not make any statement to me with reference to the number of handbills he distributed at that time.

The extent of the pedestrian traffic in front of this meat market was not very heavy, but noon hour there is usually quite a crowd of people go by there. It didn't happen to be, that is, not very, what we will call crowded, so far as pedestrian traffic is concerned. During the period I observed the activities of Harold Snyder, he handed out about 75 to 100 handbills. He had handbills in his hand when I arrested him. I did not ascertain the amount of handbills he had. After I made the arrest and we had him in the squad [fol. 17] car, taking him down to the station, he said he didn't know he was violating the law; they didn't tell him anything about it.

Cross-examination:

We were notified about five minutes to twelve that there are pickets at the Shinner's Meat Market, and we were told to kind of look around when we go by, by Captain Polcyn. We were ordered to observe the condition, and if we saw a violation we were to arrest them.

Q. And that has been the general order, to arrest persons distributing handbills or pamphlets on the street?

A. If there was a violation——

Q. Now, Mr. Officer, just answer the question, simply, and don't give us any law.

Mr. Zeidler: Let him answer the question.

Mr. Richter: Let me ask a question.

Mr. Zeidler: You have asked it. I object to the question on the ground that it is incompetent, irrelevant and immaterial, as to what the orders were.

The Court: Objection sustained, gentlemen. It doesn't make any difference.

I did not arrest anybody that threw any of the handbills on the street. I saw numbers of people drop them down in the street. There is a standing instruction and order from our superior officers not to arrest people who throw these handbills on the street.

The Court: He asked whether you got such instructions. [fol. 18] Mr. Zeidler: I am objecting to that question on the same ground.

The Court: You may answer.

Mr. Zeidler (Q.): Do you understand the question, officer?

A. Not very clearly.

Mr. Richter (Q.): Let me see if I can make it more clear. You are instructed and have been as long as you have been a police officer, that under this ordinance you are to arrest only people who distribute or circulate handbills and not people who throw any on the street, isn't that correct?

A. We have been instructed as to this ordinance—as I said, we were sent down here, and if we noticed any violation we were to arrest.

Q. What is a violation under your instruction under this ordinance?

A. The violation in this respect was that this fellow was passing out handbills, and we observed him for about 20 minutes, and noticed people throw them down, and as the streets were littered with the pamphlets we went up and picked up——

Q. Who instructed you that it was a violation to pass them out and not a violation to throw them down?

Mr. Zeidler: I am renewing my objection on the same ground.

The Court: I will sustain that objection. This is going beyond the necessities. I allowed it to go some distance, contrary to my original ruling. I am still of the opinion that the instruction received by him should not be considered by the Court. While I am not passing on it finally at this [fol. 19] moment, I am of the opinion now that whatever instructions he may have received, as testified here, are of no importance; they don't count for anything. The question is whether or not there was a violation of this ordinance, and just what was done by way of violating it, not by way of arresting the violator.

Mr. Richter: I am getting at entirely general orders of the police department. I don't want to argue it any further. We spent a lot of time on it now.

Mr. Zeidler: I make a motion to strike any such testimony relating to general orders, such as were referred to by counsel in his questions.

The Court: That is rather broad. The authority of this man to arrest is probably not necessary. He is a police officer, and without any instruction, if he observes a violation of an ordinance, he has a duty to arrest. You don't need him to testify that somebody told him to look out for violations. I think I will grant the motion to strike out anything pertaining to orders that he received.

We were up there more than one day in that locality, we travel through that vicinity, that is our district, in a patrol car.

Q. And you saw those pickets there day after day?
A. Not at that time; that was the first day they were there.

We knew about the pickets, that is all. We, ordinarily, in patrol cars, squad cars, don't get—that pertains mostly to the man on the beat. We did happen to go by there at [fol. 20] that time and the captain h.. called our attention to it. Patrolman Henry Retzer was the man with me in the squad car. One man marching there in the picket line carried a banner, and had an armful of bills.

Henry Retzer, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct examination:

I am a member of the Milwaukee Police Department, and was such police officer on the 27th day of April, 1938, and was engaged in police duties and observing what happened in front of the premises known as 1306 West Vliet street, Milwaukee, Wisconsin. 1306 West Vliet street is a meat market operated by Shinner Brothers. I viewed the premises about 12 o'clock noon, on Wednesday, April 27th, in a squad car, accompanied by Patrolman Kuczkowski. I observed the activities of the defendant, Harold Snyder, at that time. As he was walking back and forth in the picket line he passed out handbills to numerous people passing by, going east and west along the walk. He had an armful of these handbills in one arm, and some people reached out their hand to accept one of these bills, others were just walking by and he would pass out the bill, hold it in front of them for them to take it, and some of the people gave a quick glance at the bill, and dropped them on the sidewalk or in the gutter; others walked several feet and then crunched them in the hand and threw them on the walk. [fol. 21] Some of the handbills were lying on the walk on the north side of Vliet street. Some of them were lying in the gutter on the north side of Vliet street, and they were

all in front of those premises known as 1308 West Vliet, all those that were picked up by Patrolman John Kuczkowski. I do not know whether these are the ones that were picked up by Patrolman John Kuczkowski, but they were handbills similar to those that were being distributed and lying around on the street and sidewalk in that vicinity. Those were handbills which had been handed out to various pedestrians by the defendant and which were dropped by these pedestrians. There were numerous handbills of the same type lying on the south side of Vliet street, in the gutter. Some of them I observed—some of those on the car track were run over by the wheels, the eastbound. Of course they were kind of sticking to the track; some of them were lying up against the safety zone, the safety zone on the south side of the street, the rest——. This elevated safety zone is located on the southwest corner of Thirteenth and Vliet, for eastbound street car passengers. Well, as I said before, I saw two of them that were sticking to the street car rails, eastbound street car track, and three or four of them lying up against the safety island. There were dozens of them lying up against the gutter on the south side of Vliet street, just west of Thirteenth street; and I saw two of these same handbills lying on Thirteenth street, just south of Vliet. I observed the movements of this defendant for about fifteen or twenty minutes. While we were there, he was the only person distributing handbills at this [fol. 22] point. After we observed the movements of this defendant for fifteen or twenty minutes, my partner and I arrested him.

Cross-examination:

I saw three or four people drop them. Some walked across to the safety island and took the street car, and threw them down before they got on the street car. None of those that I saw dropped handbills while on the north side of Vliet street; they dropped them as they were walking on the side walk or into some other store. I did not see anybody walk across to the street car with the handbill, and I do not know how those got over there near the safety island. I did not arrest anybody there that day for dropping handbills, and I did not see Mr. Snyder drop any handbills. I saw him offer them to people, and if they didn't take them, he kept them in his hand.

Redirect examination:

This particular premises, Shinner's market, is located west of Thirteenth street on the north side of the street, and Vliet street is a street which has a number of business places on both side- of the street, such as grocery stores and meat markets, and there are department stores, clothing stores and shoe stores. The wind was blowing up there that day in a sort of an easterly direction.

[fol. 23] **Defendant's Case**

Edward Barzykowski, having been duly sworn, testified as follows:

Direct examination:

I am secretary of The Amalgamated Meat Cutters & Butcher Workmen of North America, A. F. of L. There is a labor dispute there, and we were picketing Shinner's. That is one means we have of trying to bring our message across to the public, is the handbill.

Snyder was one of a number of pickets that were operating under the directions of the Union. Shinner's had five markets in Milwaukee.

Wednesday, May 18, 1938 (In Chambers)

Ruling as to Testimony

The Court: At the request of the Court, Assistant City Attorney Carl F. Zeidler, representing the plaintiff, and Attorney Arthur W. Richter, representing the defendant, are here present. The Court announced that upon giving further consideration to the matter the Court is of the opinion that the rulings made during the trial in respect to the method or manner of administration of the ordinance in question, by the city or by the police department, are not correct and should be modified. The Court called attention to the fact that upon motion of the City Attorney, the Court struck out testimony pertaining to orders or instructions given to the police officers who testified, by their superior

officers. The Court during the trial was of the opinion that [fol. 24] such testimony was immaterial, but is now of the opinion that testimony pertaining to the method of administration of the ordinance, which would tend to show discrimination in the enforcement of the ordinance, may be properly received. The Court now vacates its former ruling, striking out testimony on the subject referred to, and now rules that the motion to strike is denied and the testimony given may stand. In view of the remarks made by the Court, as to its position on the proposition referred to, the Court now directs that the case be reopened in order to permit counsel for the defendant to ask further questions by way of cross-examination or direct examination of witnesses produced by the defendant, or to introduce any further testimony pertaining to the subject of the method of administration of the ordinance by the City of Milwaukee or by the police department, or pertaining to any discrimination in the enforcement of such ordinance. Counsel for the defendant thereupon made arrangements to produce further testimony. Now, I think we will go into the court room. Does that substantially state it?

Mr. Richter: Yes, that is a complete statement.

Mr. Zeidler: Yes.

(Trial Resumed.)

The Court: The case is reopened upon the Court's own motion, this morning, and rulings made as shown in the reporter's notes. The case being reopened, counsel for defendants I understand wishes to call a witness, either adversely or otherwise. The deputy inspector of police, Mr. [fol. 25] Goehlen, is here at the request of Mr. Richter, and if you desire to have him testify, he may be called.

Mr. Richter: Yes, I do.

The Court: Called on behalf of the defendant.

Hugo Goehlen, called as a witness on behalf of defendants, having been duly sworn, testified as follows:

Direct examination:

I am deputy inspector of police of the City of Milwaukee, and have been such since December, 1936. And prior to that I was captain of the traffic department, and prior to

that I was lieutenant of police. I have been on the police force eighteen year-, since 1921. As deputy inspector, I have charge, under the chief, of the enforcement of the laws here, and general charge of the police officers of the city. We have issued orders to our police officers that where people are passing out handbills and these handbills litter the streets, they are to make arrests. We have not issued orders to arrest any persons who throw them on the street, but are arresting those that are passing them out. Yes, that has been enforced as long as I have been on the police department, and it has also been the order and policy of enforcement of the police department not to arrest distributors who put handbills or circulars on private property, that is, who go into the private property of persons and throw handbills there. We don't make arrests of those; but if they do pass them out on the street and they litter the streets, we then make arrests.

[fol. 26] I know that there is a city-wide distribution at all times of commercial circulars into the homes on private property. Those persons are not arrested because they are not distributing them on a public highway, street or alley, and are not littering the streets.

Q. I understand the reason. I just wanted this in the evidence. And your instructions are to arrest anyone who distributes any circulars or printed matter on the street if any of those circulars or handbills afterward get onto the street, isn't that right?

A. Where they litter the streets, yes, sir.

Q. And then you arrest the distributor, but not the person who throws it on the street?

A. We arrest the cause, the man who is passing them out, yes, sir.

Q. And that has been the policy and method of enforcement of this ordinance all along, is that right?

A. It has.

Cross-examination:

The only orders the police department issues, specifically the patrolmen, not to arrest persons who distribute commercial, economic or political literature or propaganda to the homes, is where the passing of these handbills litter the streets, they are to make arrests. In other words, where

the distribution takes place on the sidewalk, streets, alleys, or in public places.

The Court: I think he has made that pretty plain.

[fol. 27] Mr. Zeidler: I just wanted to make sure that that picture has been properly presented. That is all.

Mr. Richter (Q.): On the day that these arrests were made, Inspector, which you recall very well, I know, Captain Polcyn, as the testimony shows, ordered the squad car to go to the Shinner's market, where, as you knew, picketing was going on, and observe the distribution: was that by your orders?

A. Now, Mr. Richter, I couldn't tell you that, because I don't get all the complaints that go into the district stations. That was handled by the captain individually. But, I do know that the order was issued to all district commanders that where the passing of these handbills caused the littering of the streets, they were to make arrests. Now, on an individual call, by sending a squad car or by sending a patrolman, that I couldn't answer you.

Well, if the complaint is not serious, we would not use a squad car, but if somebody says there is a serious littering of streets there, yes, a squad car would be dispatched. It all depends on the nature of the complaint. Of course I was aware that that distribution was in connection with the picketing in the labor dispute there, no doubt about it.

Reporter's certificate.
Judge's certificate.
Notice of appeal.
Undertaking on appeal.
Clerk's certificate to record.

[fol. 28] EXHIBITS 1 TO 4

To the Citizens of Milwaukee:

Since 1934 we have endeavored to organize the Shinner markets owned by E. G. Shinner Company of Delaware into union shops. The Shinner company fought us in all the courts and finally the Supreme Court of the United States decided that we had a bona fide labor dispute with the company, and had a right to picket their

places of business. Our demands are merely that they join with the vast majority of all other meat markets in the city and employ union help and comply with union conditions. It is the policy of the government of the United States, expressed in its laws, and it is the policy of the State of Wisconsin, also expressed in its laws, that employers deal with organized labor. The obstinate refusal to do so is opposition to the public policy and laws of your country and your state.

Organized labor has done its share towards helping this country out of the depression, and it wants to continue to do so. The opposition of employers like Shinner's hampers its efforts to aid the country. It is unpatriotic to work for an employer such as Shinner's is, and it is unpatriotic for you as citizens to purchase from such an employer. If you want to help the workingmen of the United States, and aid the regulation of industries towards a speedy recovery, you will not deal with Shinner's.

Do not be deceived by the claim of Shinner's that they [fol. 29] have a union in their shops. The union which they claim to have is a company union created by Shinner's, and not by its employees, and is of the type that is prohibited by the Wagner Labor Relations Law of Congress, and that has been repeatedly condemned by the courts of our country.

Shinner & Company have claimed throughout the lawsuits that they paid union wages and maintained union hours and complied with other union standards. They have just filed a so-called "contract" in the Federal Court, which shows that they pay lower wages than union butchers receive, that they work their men longer hours than unions permit, and that they do not conform to union standards. They have deceived the courts and the public on these questions.

Remember that every chain store in Milwaukee employs union butchers with the sole exception of Shinner Meat Markets.

We ask you, as good American citizens, to refrain from trading with Shinner's.

Amalgamated Meat Cutters and Butcher Workmen of North America, Local No. 73, of the American Federation of Labor.

[fol. 30] IN SUPREME COURT OF WISCONSIN, AUGUST CALENDAR, 1938—JANUARY TERM, 1939

No. 158

CITY OF MILWAUKEE, Respondent,

vs.

HAROLD F. SNYDER, Appellant

OPINION—Filed January 10, 1939

Appeal from a judgment of the circuit court for Milwaukee County: Charles L. Aarons, Circuit Judge. Affirmed.

Action by city of Milwaukee against Harold F. Snyder charging violation of a city ordinance. From a judgment of conviction the defendant appeals.

Proceedings were commenced in the District Court of Milwaukee county charging the defendant with violation of a city ordinance declaring it "unlawful for any person * * * (among other things constituting various kinds of nuisances) to circulate or distribute any circular, handbills, cards, posters, dodgers or other printed or advertising matter * * * in or upon any sidewalk, street or alley * * * within the city of Milwaukee." (We will hereinafter use the word "handbill" as including the several kinds of printed matter here enumerated and all other kinds.)

The District Court on trial dismissed the action. The plaintiff appealed to the Municipal Court from the judgment of dismissal. On the filing of an affidavit charging prejudice against the judge of the Municipal Court, the action was transferred to the Circuit Court for trial. The case was tried to the court without a jury.

During the picketing of a chain of several stores operated by the Shinner Company in the city of Milwaukee in a labor dispute between the company and a local Butcher's Labor Union affiliated with the American Federation of Labor, the defendant and several other pickets, members [fol. 31] of the union, were arrested for violation of the city ordinance above referred to by distributing handbills on the city streets and taken before the District Court of Milwaukee County for trial. The handbill set forth

the contentions of the labor union respecting the matters in dispute and requested the public not to patronize the shops operated by the company. The picket would hand a pedestrian on the sidewalk in front of a store of the Shinner Company a handbill. The person receiving a bill would ordinarily throw it upon the sidewalk or the street adjacent. No violence was committed, no threats made, and no intimidation practiced by the distributing pickets. Pedestrians who dropped the bills were not arrested. The handbills were nine by twelve inches in size. The number of handbills on the street near where the defendant was distributing the bills was stated by one of the officers who arrested him to be "dozens," and by the other officer taking part to be "seventy-five to a hundred." It was a windy day, and some of the bills were blown about.

The settled policy of the police department pursuant to a general instruction of the chief of police respecting the distribution of handbills was not to arrest the person who dropped a handbill handed to him, but to arrest the man who handed it to him, if and when, and only if and when, the bills so handed were dropped on the streets in numbers sufficient to constitute a substantial littering of a street or streets. This course was followed in the instant case. Distribution of handbills on private property was not interfered with, because such distributions were considered as not within the terms of the ordinance.

FOWLER, J.:

We consider that this case is ruled by the decision in Milwaukee v. Kassen, 203 Wis. 383, (1931) 234 N. W. 352, which involved the same ordinance and substantially the same facts as to distribution. The ordinance is set out in full at p. 384 of the Kassen Case. In that case political handbills were being distributed in the same manner and with the same effect as here. In that case and a prior case it was held that "The object sought to be attained by the ordinance evidently is to prevent an unsightly, untidy and offensive condition of the sidewalks." Mittleman v. Nash [fol. 32] Sales, Inc., 202 Wis. 577, 232 N. W. 527. All points here raised were raised in the Kassen Case, except such as are hereinafter discussed. We see no need to restate or add to what is said in that case upon the points there covered.

It is contended that the case of Lovell v. City of Griffin, 303 U. S. 444, 82 L. Ed. 660 (1938) overrides the Kassen Case and requires the reversal of the instant one. The ordinance involved in the Griffin Case was held to violate the Constitution of the United States in that it unduly restricted the rights of the citizen as to freedom of speech and press and in the free exercise of religion. No question of religion is here involved. The ordinances involved in the two cases are so widely different that we perceive no conflict between the decisions. The act involved in the Griffin Case was that of the free distribution within the city of a tract or pamphlet "setting forth the gospel of the Kingdom of Jehovah," a religious cult of which the petitioner in certiorari was a member, without having first procured a license so to do as required by an ordinance of the city. The ordinance prohibited "the practice of distributing, either by hand or otherwise, of circulars, handbooks, advertising or literature of any kind, whether delivered free or sold, within the limits" of the city unless a license was first procured from the city manager. So doing was declared a nuisance. The ordinance was manifestly not aimed to prevent the littering of streets, as was the instant ordinance. The opinion in the Lovell Case, supra, written by Mr. Chief Justice Hughes negatives the idea that an ordinance aimed to prevent "the littering of the streets" is within the purview of the decision in that case. It is said p. 662:

"It (the ordinance) is not limited to ways which might be regarded as inconsistent with the maintenance of public order, or as involve disorderly conduct, the molestation of the inhabitants, or the misuse or littering of the streets."

The implication plainly is that an ordinance so aimed is not unconstitutional, if reasonable in its terms. The construction of the Milwaukee ordinance, as held by our state court, is binding upon the federal courts, so far as its aim or purpose is concerned. The purpose of the ordinance would not, of course, except it from operation of the freedom of speech, press and religion provisions of the United States Constitution, or from the operation of the XIVth [fol. 33] Amendment thereto if it were enforced in a discriminatory manner or in such a way as unreasonably to restrict the rights of the citizens thereunder. But the instant ordinance was found in the instant case not to

have been so enforced, and the trial court held and we consider correctly that the defendant's rights were not unreasonably restricted.

Unless and until delivery of the handbills was shown to result in a littering of the streets their distribution was not interfered with.

The only contention of the defendant here made, so far as we can discover, that was not made in the Kassen Case, supra, is that the distribution of the handbills was lawful under a statutory provision enacted since that case was decided, sec. 103.53 (1) (a) of the State Labor Code. This declares lawful "Giving publicity to and * * * communicating information regarding the existence of, or the facts involved in, any (labor) dispute, whether by advertising, speaking, patrolling any public street or any place where any persons may lawfully be, without intimidation or coercion, or by any other method not involving fraud, violence, breach of the peace, or threat thereof."

The distribution here involved did not do any of the things impliedly prohibited by this section in "communicating information," and the content of the handbill was such as to be within the meaning of "giving publicity" and "communicating information" thereby declared lawful. But properly construed this does not make lawful the doing of things that violate existing lawful statutes or ordinances. The things mentioned which the code provision cited expressly permits must be done without so doing. That provision was not intended and can not be construed to repeal or render void existing valid ordinances enacted to provide for the necessities or convenience of traffic in the city streets or their safety or seemly appearance, and it can not be construed so to operate.

By the Court:

The judgment of the circuit court is affirmed.

[fol. 34] State of Wisconsin,
Supreme Court:

I, Arthur A. McLeod, Clerk of the Supreme Court of the State of Wisconsin, do hereby certify that I have compared the above and foregoing with the original, printed

"case" filed August 19th, 1938, and the opinion of the Court filed January 10th, 1939, and now on file in my office in the above entitled cause, and that it is a correct transcript therefrom, and of the whole thereof.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at Madison, the 31st day of January, A. D. 1939.

Arthur A. McLeod, Clerk of the Supreme Court of Wisconsin. (Seal Supreme Court of Wisconsin).

[fol. 35] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed April 17, 1939

The petition herein for a writ of certiorari to the Supreme Court of the State of Wisconsin is granted, and the case is assigned for argument immediately following No. 715.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1938.

HAROLD F. SNYDER,
Petitioner,
vs.
CITY OF MILWAUKEE,
Respondent.

No. [redacted] 18

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN AND SUPPORTING BRIEF.

A. W. RICHTER and
OSMOND K. FRAENKEL,
Counsel for Petitioner.

St. Louis Law Printing Co., 415 North Eighth Street. CEntral 4477.

INDEX.

Cases Cited.

Statute and Ordinance.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1938.

HAROLD F. SNYDER, Petitioner,

vs.

CITY OF MILWAUKEE, Respondent.

No. .....

PETITION FOR WRIT OF CERTIORARI

to the Supreme Court of the State of Wisconsin.

To the Chief Justice of the United States and Associate Justices of the Supreme Court of the United States:

Harold F. Snyder respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Wisconsin affirming a judgment of the Circuit Court of Milwaukee County, which had found petitioner guilty of distributing handbills in violation of a City ordinance of the City of Milwaukee.

SUMMARY STATEMENT OF MATTERS INVOLVED.

Petitioner, and eighteen other persons, all of whom were at the time pickets of the Amalgamated Meat Cutters and Butcher Workmen of North America, American Federation of Labor, Local 73, a labor union in Milwaukee, were arrested for the violation of the handbill ordinance of the City of Milwaukee (Sec. 865, Art. 16, Milwaukee Code, 1914), in distributing as a part of such picketing the circulars similar to Exhibit 1 (R. 18). Petitioner and the other defendants were tried in the District Court of Milwaukee County, and were discharged upon the ground of the unconstitutionality of the ordinance. Respondent, City, appealed and upon trial de novo in the Circuit Court of Milwaukee County, petitioner moved at the commencement of the trial to dismiss the prosecution upon the ground that the handbill ordinance, Section 865, Milwaukee Code (R. 7), was unconstitutional on its face, because it deprived him, and the other defendants, of their right to freedom of speech and the press, in violation of the due process clause of the Constitution of the United States (Judge's decision, R. 1). The case was submitted upon undisputed testimony, and at the close of the trial the motion to dismiss was renewed upon the foregoing ground, and upon the ground that the manner of enforcement of the ordinance as shown by the evidence also violated petitioner's right under the due process clause, and under the equal protection clause of the Fourteenth Amendment of the Federal Constitution (R. 2).

The trial court filed a written decision setting forth its grounds for sustaining the ordinance (R. 1 et seq.). The Supreme Court of Wisconsin, the highest court in the state, affirmed the judgment upon the grounds set forth in the written opinion (R. 20 et seq.).

City of Milwaukee v. Snyder, January 10, 1939, 283 N. W. 301.

The ordinance (R. ....) prohibits the throwing of slops, dirty water, dead carcasses and other nauseous and unwholesome matter, or any rubbish, paper, etc., upon any streets, sidewalks or other public places in the City of Milwaukee. The ordinance, which is part of the chapter on health of the Milwaukee Code, is headed "Throwing filth, rubbish or nauseous substances on streets." It provides, further, that it is unlawful "to circulate or distribute any circulars, handbills, cards, posters, dodgers or other printed or advertising matter."

Petitioner and his codefendants were prosecuted under the latter clause.

The evidence showed that petitioner and his codefendants distributed the handbills in an orderly manner; that they were very careful not to throw any into the streets, but that some of the persons who accepted the handbills did throw them into the streets, and that there were a number of handbills in the gutters and on the street.

The evidence also showed that the police officers did not arrest any of the persons who accepted the handbills and threw them onto the street, and that this was in accordance with the policy of the police department, which was to arrest the distributors, but not those who threw the printed matter into the streets.

QUESTIONS PRESENTED.

The case presents the question whether an ordinance which prohibits all distribution of handbills, circulars or printed matter of any kind, is valid under the Fourteenth Amendment of the Constitution of the United States.

The case also presents the question whether enforcement of the ordinance solely against persons distributing printed matter, and refusal to enforce it against persons actually littering the streets, is such discrimination as to render the ordinance invalid.

These questions involve the subsidiary question as to whether the interpretation of the ordinance by the Supreme Court of Wisconsin so as to cover only such distribution of printed matter as results in littering of the streets is effective to sustain the ordinance.

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT.

The Supreme Court of the State of Wisconsin, a court of last resort, has decided a federal question in a way in conflict with applicable decisions of this Court.

Lovell v. City of Griffin, 303 U. S. 444, 82 L. Ed. 660, 58 S. C. 666;
Grosjean v. American Press Co., 297 U. S. 233;
Herndon v. Lowry, 301 U. S. 242, 81 L. Ed. 631;
De Jonge v. Oregon, 299 U. S. 353, 81 L. Ed. 189;
Near v. Minnesota, 283 U. S. 691;
Stromberg v. California, 283 U. S. 359.

Other cases involving the same question are before this Court, or will shortly be here, on appeal.

Young v. California (Dec. 9, 1938, not yet officially reported), 85 Pac. (2nd) 231, Docketed as No. 715 in this Court;
Nichols v. Massachusetts (Dec. 2, 1938, not yet officially reported), 18 N. E. (2nd) 166.

The question is of general concern throughout the United States.

The decision of the Supreme Court of Wisconsin is contrary to the decisions of other courts.

People v. Armstrong, 73 Mich. 288;
People v. Johnson, 117 N. Y. Misc. 133;
City of Chicago v. Schultz, 341 Ill. 208;

People ex rel. Gordon v. McDermott, 169 N. Y. Misc. 743;
C. I. O. v. Hague, 25 F. Supp. 127 (affirmed January 26, 1939, now awaiting decision in this Court).

Wherefore, it is respectfully prayed that a writ of certiorari be issued out of, and under the seal of, this Honorable Court directed to the Supreme Court of the State of Wisconsin commanding that Court to certify and send to this Court for its review and determination the full and complete transcript of the record and all proceedings in the case at bar, and that the judgment of the said Supreme Court of the State of Wisconsin may be reversed by this Honorable Court, or the case ordered dismissed, and that your petitioner may have such other and further relief in the premises as this Honorable Court may deem just and proper, and your petitioner will ever pray.

HAROLD F. SNYDER,
Petitioner,

A. W. RICHTER and
OSMOND K. FRAENKEL,
Counsel for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

I.

JURISDICTION.

The jurisdiction of this Court is invoked under Judicial Code, Sec. 237-b, as amended by the Acts of February 13, 1925, and March 8, 1934, 28 U. S. C. 344-b.

The date of the final judgment is January 10, 1939, on which date the Supreme Court of Wisconsin affirmed the conviction of petitioner and his codefendants (R. 23). No application for rehearing was made.

The nature of the case and the rulings below bring the case within the jurisdictional provisions of section 237-b, supra. The claims of federal constitutional right were specifically raised and set up at the commencement of the trial by motion to dismiss (R. 1) and by similar motion at the conclusion of the trial (R. 1). The trial court overruled said motions and denied said claims of federal constitutional right and by its final judgment rendered judgment against said claims (R. 3). The Supreme Court of the State of Wisconsin in its opinion specifically affirmed said denial of petitioner's claimed constitutional rights, and specifically passed adversely upon petitioner's claimed constitutional right, and overruled the same (R. 20 et seq.).

The federal rights claimed by petitioner are that the ordinance is unconstitutional upon its face, as applied to him, in denying him due process of law under the Fourteenth Amendment of the United States Constitution, and denying him the equal protection of the laws under the same amendment of the Constitution of the United States. The first of these claims is based upon the contention that

petitioner's right to freedom of speech and freedom of the press were violated by the prohibition of the distribution of handbills and circulars contained in the said ordinance (Sec. 865, Art. 16, Milwaukee Code 1914; R. 7). The second claim of the denial of federal right is based upon the undisputed fact (R. 2, 17), and the finding of the trial judge, that the City of Milwaukee, through its Police Department, in enforcing the said ordinance, consistently failed to arrest persons who actually littered the streets, and consistently arrested only persons who distributed leaflets or handbills without littering the streets.

The following cases, among others, sustain the jurisdiction of this Court:

Lovell v. Griffin, 303 U. S. 444;
Yick Wo v. Hopkins, 118 U. S. 356.

II:

STATEMENT OF THE CASE.

As appears from the petition, supra, petitioner and his codefendants were convicted under the Milwaukee ordinance for distributing a handbill dealing with a labor controversy (R. 18). It was not contended by the prosecution that petitioner and his codefendants had littered the streets, and the trial judge found that they had not (R. 2). The contention was that some of the persons who had accepted the handbills had thrown them into the streets, and had, to some extent, littered the streets (R. 2). The undisputed evidence also showed that the police officers observed the persons who accepted and threw away the handbills, and caused whatever littering of the streets there was, but failed to arrest them, and that this failure to arrest was in accordance with their orders and the general policy of the City as carried out by its Police Department to arrest only distributors (R. 9, 11, 14).

Originally, petitioner and his codefendants were dis-

charged upon the ground that the ordinance was unconstitutional, but upon appeal by the City of Milwaukee the Circuit Court of Milwaukee County reached a contrary conclusion, which was affirmed by the Supreme Court of the State of Wisconsin.

III.

OPINION BELOW.

The decision of the Supreme Court of Wisconsin is based upon the theory that the ordinance in question is a valid exercise of the police power by the City.

City of Milwaukee v. Snyder, January 10, 1939, not yet officially reported, 283 N. W. 301.

The Court bases this conclusion upon a prior decision,

Milwaukee v. Kassen, 203 Wis. 383 (1931), 234 N. W. 352,

in which it had announced the doctrine, which it reaffirms in the present case, that the ordinance was not intended to prevent distribution unless such distribution results in a littering of the streets, and that, under such interpretation, the ordinance was valid.

The reasoning of the Court is based upon the theory that, if the ordinance is restricted to cover only such distribution as results in a littering of the streets, then it can be sustained as a valid exercise of the police power in that it has relation to the promotion of cleanliness and safety of the municipality.

ERRORS TO BE ASSIGNED.

The Supreme Court of Wisconsin erred:

1. In holding that the ordinance did not violate the Constitution of the United States.

2. In holding that the method of enforcement did not render the ordinance invalid under the Constitution of the United States.

ARGUMENT.

A. Case Ruled by Lovell v. Griffin.

The question is identical with the question which was before this Court in

Lovell v. City of Griffin, 303 U. S. 444.

There is no essential distinction between the ordinances in the two cases which would give the basis for distinction in law. As to the ordinance in that case, this Court said (p. 450):

> "The ordinance in its broad sweep prohibits the distribution of 'circulars, handbooks, advertising, or literature of any kind.'"

That ordinance by its terms prohibited distribution without obtaining a permit from the city manager; the Milwaukee ordinance in question here makes it unlawful to circulate or distribute any circular, handbill or other printed matter. It is clear that the provision of the Milwaukee ordinance is more drastic in the denial of the right of distribuiton than the Griffin ordinance. The Griffin ordinance was not a categorical prohibition, but gave a conditional right of distribution; the Milwaukee ordinance absolutely prohibits any distribution.

Upon the question of the tenability of the ground assigned by the Wisconsin Supreme Court for sustaining the ordinance, that is, that it may be interpreted so as to be sustained as a police power measure, the decision of this Court in the Lovell case is conclusive. This Court there holds

> "that the ordinance is invalid on its face."

Therefore, whether there were any grounds under the police power for the passage of the ordinance or not could not avail to sustain it. If the ordinance is invalid on its

face, then no question as to its applicability to a given necessity in the health, welfare or safety of the City can avail to sustain it. If the Griffin ordinance is invalid on its face, then the Milwaukee ordinance is likewise so invalid, and this regardless of

"whatever the motive which induced its adoption."

The very reasons which are given by the Supreme Court of Wisconsin, that is, that the ordinance is an exercise of the police power adopted by the City to promote cleanliness and health on its streets, was the basis of the only plausibly tenable argument advanced in support of the Griffin ordinance. The brief of counsel for appellee in that case (303 U. S. 444) advances as its principal contention in support of the ordinance the argument that it falls within the permissible field of regulation open to every municipality in facing the sanitary problem of removing from its streets papers, circulars and other like materials. This Court, therefore, considered and ruled upon the very ground urged in support of the ordinance upon which the decision of the Supreme Court of Wisconsin is based. Therefore, the rule of the Wisconsin Supreme Court that the ordinance may be sustained as an exercise of the police power when interpreted as applying only to situations where distribution results in substantial littering of the streets is contrary to the decision of this Court. It is submitted that the decision of the Wisconsin Supreme Court affords no ground of distinction between the Griffin ordinance and the Milwaukee ordinance, and that, under the decision of this Court in the Griffin case, the judgment in the present case should be reversed.

B. Applicability of Police Power.

What has been said above refers to the police powers generally as a possible justification for antidistribution

ordinances, without regard to the particular situation claimed to be met by the Milwaukee ordinance. The first question to be decided in considering the matter of the police power, with reference to such ordinances, would be whether there is any situation sufficiently grave to justify absolute prohibition of all distribution of literature on streets and highways as a police power measure. That question is apparently left open by this Court in the Lovell case (303 U. S. 451).

However, since distribution is a part of freedom of speech and freedom of the press, and, therefore, protected as a fundamental constitutional right under the Constitution of the United States, only the very gravest necessity, if anything, could justify the complete suppression of that part of the liberty of the press consisting in the right of distribution.

> Near v. Minnesota, 283 U. S. 691, 707 et seq.;
> Stromberg v. California, 283 U. S. 359, 368;
> De Jonge v. Oregon, 299 U. S. 353, 364 et seq.

The ordinance presents not a restriction of the right guaranteed by the Constitution proportionate to a necessity existing in the public order and requiring the application of the police power, but a complete deprivation of the right not related to nor commensurate with any such public necessity. It is submitted that a complete prohibition of the exercise of the liberty guaranteed by the Constitution can in no event find defense in the police power, at least not in the absence of gravest necessity for the very preservation of government or the safety of our people.

C. Specific Application of Police Power in Present Ordinance.

The particular evil which the Wisconsin Supreme Court sets out as the excuse for the prohibitory ordinance in

question consists in the unsightly and untidy condition created on the streets by the casting away of the hand bills and circulars distributed. The Court says, quoting from its prior decision in Milwaukee v. Kassen, 203 Wis. 383 (1931), 234 N. W. 352:

> "The object sought to be attained by the ordinance evidently is to prevent an unsightly, untidy and offensive condition of the sidewalks."

Baldly stated, therefore, the basis of the decision of the Supreme Court of Wisconsin is that it is a sufficient ground to take away all right of distribution of any printed matter on the streets of the City merely to prevent unsightly and untidy condition of the streets. Certainly it would seem clear beyond argument that so fundamental a right as the right of free speech and free press, as interpreted by this Court, cannot be abridged materially, let alone entirely abrogated, for so insignificant a reason as tidiness of streets. Certainly it is clear that tidiness of streets does not comprehend within itself such a necessity as requires so drastic an application of the police power as is here involved. That the necessity does not justify the scope of the exercise of the power in this case is evident.

D. Ordinance Adequate to Meet Necessity Without Deprivation of Constitutional Rights.

However, not only is the object to be attained by this ordinance on the theory of the Supreme Court of Wisconsin not adequate to afford a basis under the police power for the deprivation of a fundamental constitutional right, but adequate provision is made in the ordinance to meet the very necessity which the Court assigns as the ground for the validity of the ordinance.

The ordinance provides in its principal part that it is

unlawful to throw or leave certain noxious substances, rubbish, **paper or other substances whatsoever** upon sidewalks, streets, etc. Thus it is forbidden under the ordinance to throw paper upon the streets, and the enforcement of this part of the ordinance would achieve the cleanliness and tidiness which the Court gives as the legitimate object of the ordinance. Enforcement of the ordinance, according to its express terms, would remove all necessity for encroachment on constitutional rights.

However, the testimony showed, and the trial court states (R. 3) that the police officers did not arrest anyone who threw handbills upon the street, and that it was the policy of the police department that only those distributing, and not those actually littering, be arrested, and that this has been the policy of the police department all along. Clearly, no grave problem of health, sanitation or public safety exists, but the City can achieve the cleanliness and tidiness of its streets which the Wisconsin Supreme Court deems of sufficient importance to be the ground for the sacrifice of the fundamental constitutional rights merely by enforcing the unquestionably valid part of the ordinance. It cannot be said that there exists a necessity which is adequate, and that means commensurate with such necessity are prescribed by the ordinance so as to justify the sacrifice of basic constitutional rights when the enforcement of the valid portions of the ordinance would meet the need. The long and consistent practice and the established policy of the City in the enforcement of this ordinance would seem to indicate that the tidiness and neatness of the streets did not seem to be so much the desired end as the prevention of the distribution of the views, beliefs and opinions of persons, was and is the real end of the ordinance.

But the Supreme Court of Wisconsin cannot reach its view of the ordinance even to create this untenable de-

fensibility of it as a police power measure by the ordinary process of interpretation or construction, but must resort to a process of creating additional parts of the legislation. The ordinance provides that it is

> "unlawful for any person to circulate or distribute any circular, handbills, cards, posters, dodger or other printed or advertising matter * * * in or upon any sidewalk, street or alley * * * within the City of Milwaukee."

The Court interprets this plain language to mean that distribution is prohibited when it results in actual littering of the streets, that is, when distribution is in such quantities, or in such manner, or perhaps in such type of circular that substantial quantities, as the Court says, get on the streets. This is far from the language of the ordinance, and it is submitted that it is not what the Court says the ordinance is, but what it actually is, that this Court must decide.

> "Thus the crucial question is not the formal interpretation of the statute by the Supreme Court of Georgia, but the application given it."
>
> Herndon v. Lowry, 301 U. S. 242, 260;
> Near v. Minnesota, 283 U. S. 697, 711.

Furthermore, the construction by the Wisconsin Supreme Court cannot save the ordinance from constitutional invalidity, because it creates such indefiniteness and uncertainty of the offense as to make fair and just enforcement impossible, and therefore renders the legislation unconstitutional for uncertainty.

> Stromberg v. California, 283 U. S. 359, 369;
> U. S. v. L. Cohen Grocery Co., 255 U. S. 81, 87, 41 S. C. 298, 65 L. Ed. 516;
> Herndon v. Lowry, 301 U. S. 242, 261 et seq., 81 L. Ed. 631.

It is submitted that the additions to the ordinance contained in the decisions of the Supreme Court of Wisconsin cannot render it valid.

E. The Decision of the Wisconsin Supreme Court Is at Variance With Lovell v. Griffin and the Decisions of Other Courts.

The Supreme Court of Wisconsin attempts to reconcile the ordinance in question with the decision of this Court in Lovell v. Griffin, but it is submitted that such attempted reconciliation is based upon a misconception and misinterpretation of the decision of this Court in that case.

The Court says, with reference to the opinion of Mr. Chief Justice Hughes, that it negatives the idea that an ordinance aimed to prevent the littering of the streets is within the purview of the decision, and quotes from the decision of this Court, as follows:

> "It (the ordinance) is not limited to ways which might be regarded as inconsistent with the maintenance of public order, or as involve disorderly conduct, the molestation of the inhabitants, or the misuse or littering of the streets."

The Court says with reference to this language:

> "The implication plainly is that an ordinance so aimed is not unconstitutional, if reasonable in its terms."

The language above quoted from the opinion of this Court in the Lovell case evidently refers to provisions of an ordinance relating to the acts and conduct of persons distributing circulars, handbills, etc., that is, such an ordinance might validly and without infringing constitutional rights prevent breaches of the peace, disorderly conduct, molestation of inhabitants, littering of streets,

and the like, by distributors of handbills or other printed matter, but no such ordinance or other legislative enactment could constitutionally take away or even limit the constitutional rights of persons desiring to distribute their views and opinions to their fellowmen, because some one else was guilty of disorderly conduct, molestation of inhabitants, littering or the like. Distribution may be limited to prevent disorderly conduct and other acts inimicable to the public peace or welfare by the distributor. Clearly, this is purport of the language of the Chief Justice in the Lovell case. The interpretation of the Milwaukee ordinance by the Wisconsin Supreme Court validates not only the limitation, but the complete prohibition of any distribution because some one other than the distributor litters a street. The Court not only holds, but it has been the settled practice, as the Court said, to punish the distributor when the recipient throws the handbill into the street. Certainly, the language of the Chief Justice in the Lovell case did not mean to include in the field of permissible restriction of distribution limitations based on the acts of other and unrelated persons than the distributor. There is no warrant in the language of the Chief Justice for the conclusion of the Wisconsin Supreme Court that an ordinance which deprives a person of his constitutional rights on account of the acts of others, can be constitutionally valid. It is submitted that the Milwaukee ordinance under the interpretation of the Supreme Court of Wisconsin takes away the constitutional rights of one on account of the acts of another, and is therefore an unjustifiable deprivation of rights guaranteed by the Constitution of the United States.

Respectable authorities elsewhere have reached the same conclusion.

People v. Armstrong, 73 Mich. 288;
People v. Johnson, 117 N. Y. Misc. 133;

City of Chicago v. Schultz, 341 Ill. 208;
People ex rel. Gordon v. McDermott, 169 N. Y. Mis. 743;
C. I. O. v. Hague, 25 F. Supp. 127, affirmed January 26, 1939, now awaiting decision in this court.

It is submitted that these cases are correct on principle, and that the doctrine therein announced is within the rule of Lovell v. Griffin and should be followed in the present case.

F. The Method of Enforcement of the Milwaukee Ordinance Also Rendered It Unconstitutional.

It is undisputed in the case that it has been the policy of the police department, in enforcing this ordinance, not to arrest any persons who throw circulars or handbills on the streets or public places, but to arrest the distributors who hand them out. The evidence also showed that this was the practice followed with reference to petitioner and the other defendants. It has been the consistent policy of the City of Milwaukee to ignore that part of the ordinance which would have effectively prevented littering of the streets, and to enforce the prohibition against distribution, notwithstanding that the distributor did nothing but distribute.

The rule of law with reference to unconstitutional conditions is not logically or rationally limited to discrimination on account of race or color. It is the doctrine of this Court that

> "A valid law may be wrongfully administered by officers of the state so as to make such administration an illegal burden and exaction upon the individual."
>
> C. B. & Q. R. Co. v. City of Chicago, 166 U. S. 226, 233 et seq., 17 Sup. Ct. 581, 41 L. Ed. 979.

Discriminatory administration of otherwise apparently valid laws renders them unconstitutional.

Yick Wo v. Hopkins, 118 U. S. 356;
Crowley v. Christensen, 137 U. S. 86, 91, 11 Sup. Ct. 13, 34 L. Ed. 620;
Raymond v. Chicago Union Traction Co., 207 U. S. 20, 35, 28 Sup. Ct. 7, 52 L. Ed. 78;
Ah Sin v. Wittmann, 198 U. S. 500, 26 Sup. Ct. 367, 49 L. Ed. 1142;
Dobbins v. Los Angeles, 195 U. S. 223, 240, 49 L. Ed. 169.

The City has not only not enforced the law against those who actually littered the streets, but it has never enforced it against general distribution on the public streets of newspapers and periodicals, notwithstanding the express language of the act by which it applies to all printed matter.

There is apparent the discriminatory administration as against the impecunious citizen, the poor minority, which cannot afford to buy space in our expensive newspapers and periodicals to express its views to its fellowmen. The labor union, as in the instant case, does not generally have the money to make use of the high-priced privately owned press of the country to disseminate its views. The poor religious sect, the sincere and self-sacrificing social reformer, the political liberal and others not of financial ability to spend large sums to distribute their opinions, views and beliefs, are denied the only feasible method of using their constitutional right to disseminate their views. Such method of enforcement creates the unconstitutional condition which renders the law invalid.

CONCLUSION.

The question decided in Lovell v. Griffin has not been set at rest by that decision. In all parts of the country

there has been vigorous enforcement of legislative enactments which were assumed to be clearly outlawed by the decision. Cases from the States of Massachusetts and California are now in this court, or will be here in the very near future. In both instances, according to the information received, they involve questions identical, or almost identical, with those involved in the present case. In order that it may be known to the country whether any prohibition of distribution of pamphlets, handbills or circulars is valid under the doctrine of Lovell v. Griffin, and what limitations may be put upon such distribution, it is submitted, certiorari should be granted in this case.

It is, therefore, submitted that the writ of certiorari should be granted as prayed for, and the decision of the Supreme Court of Wisconsin should be reviewed.

Respectfully submitted,

A. W. RICHTER and
OSMOND K. FRAENKEL,
Counsel for Petitioner.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1939

No. 18

HAROLD F. SNYDER,

Petitioner,

vs.

CITY OF MILWAUKEE,

Respondent.

BRIEF FOR PETITIONER

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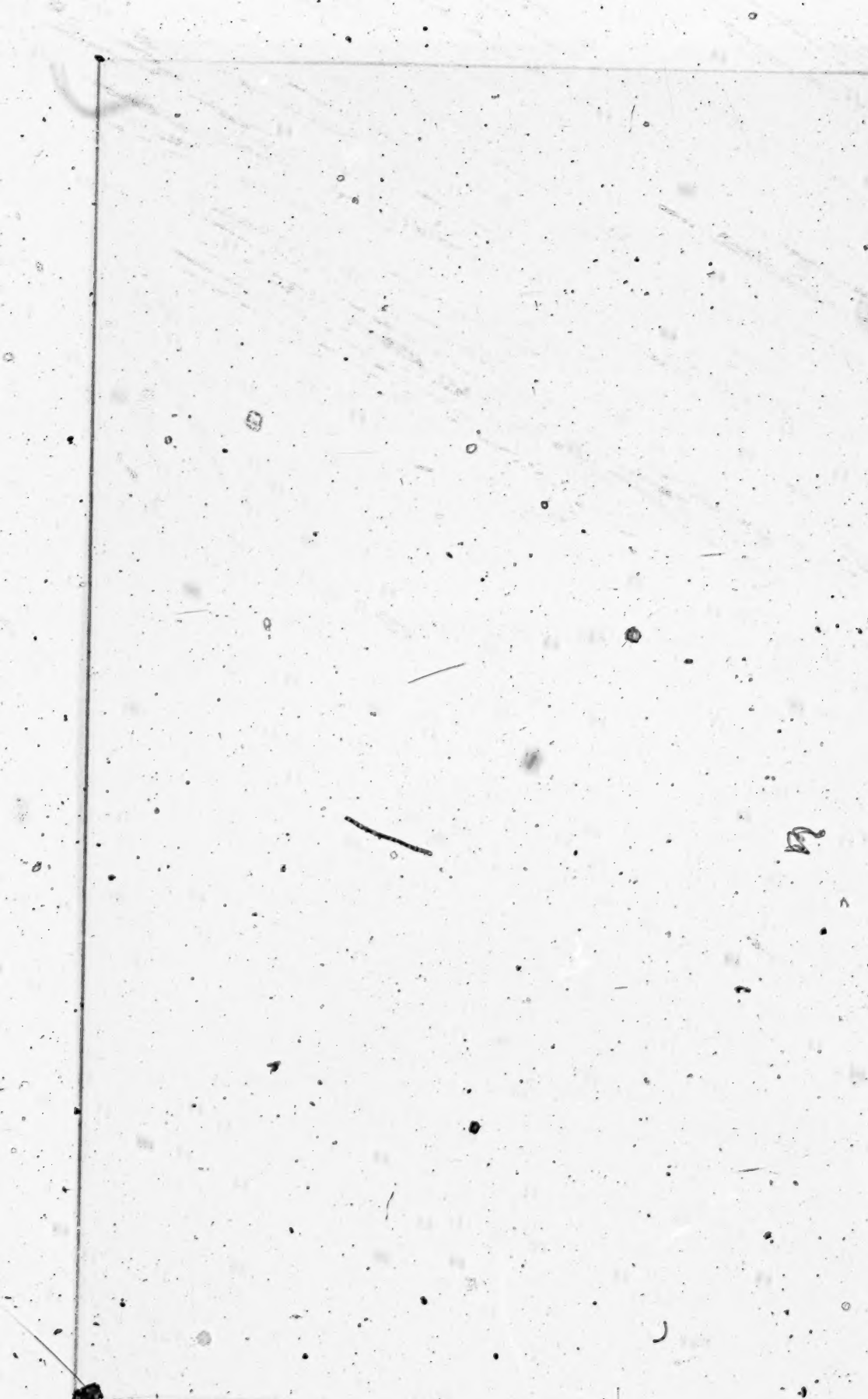
HAMMERSMITH-KORTMEYER CO., MILWAUKEE

INDEX

TABLE OF CASES



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BRIEF FOR PETITIONER

I. OPINION OF THE COURT BELOW

This case comes to this Court pursuant to certiorari granted on April 17, 1939.

The opinion below was reported in 283 N.W. 301.

II. JURISDICTION

1. The statutory provision is Judicial Code Section 237-b as amended by the Acts of February 13, 1925 and March 8, 1934, U.S.C. Title 28 Section 344-b.

2. The date of the judgment is January 10, 1939 on which date the Wisconsin Supreme Court affirmed the

conviction herein (R. 23). No application for rehearing was made.

3. The nature of the case and the rulings below bring the case within the jurisdictional provisions of Section 237-b, supra.

The claims of federal constitutional right were specifically raised up at the trial by motion at the commencement of the trial (R. 1) and by similar motion at the conclusion of the trial (R. 1). The Trial Court in rendering judgment ruled against the federal claims (R. 8). The Supreme Court of the State in its opinion specifically passed upon the claims of federal right and overruled the same (R. 20 ff.).

The federal rights claimed by petitioner are that the ordinance under which he was convicted is, upon its face, as applied to him, unconstitutional in denying to him due process of law under the Fourteenth Amendment to the United States Constitution and the equal protection of the laws under the United States Constitution. The first of these claims is grounded upon the contention that petitioner's right to freedom of speech and freedom of the press were violated by the prohibition of the distribution of handbills contained in said ordinance (§ 865, Art. 16, Milwaukee Code 1914—R. 7) and by the insufficiency of the charge upon which he was tried. The ordinance in question is as follows:

"(From Article 16 of Ch. XVII—'Health'—
of the Milwaukee Code)

Article 16 is headed: 'Garbage, Rubbish, Nauseous Substances and Odors.'

§ 865 is headed: 'Throwing filth, rubbish or nauseous substances on streets,' etc., and reads as follows:

'It is hereby made unlawful for any person, firm, or corporation, or for any officer, member, agent, servant or employe of any firm or corporation to place, throw or leave any slops, dirty water, or other liquid of offensive smell, or other nauseous or unwholesome, or any dead carcass, (fol. 12) carrion, meat, fish, entrails, manure or other nauseous or unwholesome matter or substance, or any rubbish, ashes, paper, dirt, stones, bricks, manure, tin cans, boxes, barrels, or other substances whatsoever, *or to circulate or distribute any circular, handbills, cards, posters, dodgers or other printed or advertising matter,* or to drain or pour or to permit to drain or flow oil, kerosene, benzine, or other similar oil or oily substance or liquid, *in or upon any sidewalk, street,* alley, wharf, boat landing, dock or other public place, park or ground, *within the city of Milwaukee.* Provided, however, that this section shall not apply to any garbage, manure, ash boxes or receptacles, which are built and maintained not less than twelve inches above the grade of the alley, nor more than three feet from the line of any lot or parcel of land abutting upon any alley in said city. Said boxes so built and maintained shall be waterproof, and shall at all times be kept securely covered except when depositing or removing the contents therefrom." (The relevant portion is in italics).

The second claim of federal right rests upon the undisputed fact (R. 2, 17) that the police of the City of Milwaukee in enforcing this ordinance consistently failed to arrest the actual litterers of the street and instead arrested only the persons distributing the leaflets.

4. The following cases, among others, sustain the jurisdiction:

Lovell v. Griffin, 303 U.S. 444;
Hague v. C.I.O., 59 Sup. Ct. 954;
Yick Wo v. Hopkins, 118 U.S. 356.

III. STATEMENT OF THE CASE

Petitioner was convicted for distributing a leaflet dealing with a labor controversy (R. 8). There was no contention that petitioner had littered the streets and the trial court found that he had not (R. 2), but only that others who had accepted the leaflets had, to some extent, littered the streets (R. 2). The evidence showed (R. 9, 11, 14) that the police officers did not arrest anyone who accepted the handbill and threw it on the street and that this was in accordance with the general policy of the Police Department to arrest only the distributors.

Originally, petitioner was discharged on the ground that the ordinance was unconstitutional but upon an appeal by the City of Milwaukee, the Circuit Court of Milwaukee reached a contrary conclusion (R. 7), which was affirmed by the Supreme Court of that state (R. 23).

The Supreme Court rested its decision largely on the case of *Milwaukee v. Kassen,* 203 Wis. 383, 234 N.W. 352 (R. 21). The *Lovell* case was distinguished on the ground that the ordinance restricted distribution throughout the city and was not aimed to prevent the littering of streets (R. 22). The Court was of the view that the Milwaukee ordinance did not unreasonably restrict the constitutional rights of defendant stating:

> "Unless and until delivery of the handbills were shown to result in a littering of the streets, their distribution cannot be interfered with" (R. 23).

ERRORS ASSIGNED

The court deprived petitioner of his constitutional right to due process of law as guaranteed by the Fourteenth Amendment, by

1. Refusing to hold the ordinance invalid on its face.

2. In sustaining the conviction of an offense not charged.

3. In refusing to hold the ordinance invalid in spite of admitted discriminatory administration.

PETITIONER'S CONTENTIONS

I.

The ordinance in question is invalid on its face.

II.

The conviction is invalid, because petitioner was not charged with the offense of which he was convicted.

III.

Discriminatory administration of the ordinance rendered it invalid, if it had not been invalid on its face.

SYNOPSIS OF ARGUMENT

Under Lovell v. Griffin, leaflet distribution, is a constitutional right under the Fourteenth Amendment.

Petitioner is charged only with distribution.

He did not litter the streets.

His conviction cannot be justified because others threw handbills in the streets.

The conviction can be upheld only if a municipality may prohibit harmless acts, because harm may result from the acts of others.

This is contrary to Stromberg v. California and Herndon v. Lowry.

The Wisconsin court sustains the ordinance by limiting it to cases resulting in littering.

The contention that ordinances of this kind are aimed at littering, is specious.

Restriction of freedom of speech and of the press, is permissible only to prevent serious evil to the State.

This Court passes upon the necessity of Police Power Legislation.

Before the decision of this Court in Lovell v. Griffin other courts held anti-distribution ordinances invalid.

Since that decision other cases have ruled the same way.

In the Hague case, this court held the ordinance void on its face, and modified the injunction which was restricted so as not to apply where distribution caused littering.

Other courts have come to a contrary result by attempting to distinguish the ordinances.

But the constitutional question received little consideration.

The chief distinction claimed in the three cases now before this Court is, that ordinances in those cases are limited to distribution on streets, while the ordinance in the Lovell case applied to distribution throughout the city limits.

This distinction has no validity.

It is also argued that the ordinance in the Lovell case was not aimed at littering, while the present ordinance is.

The present ordinance is an absolute prohibition of distribution.

The reference of the Chief Justice to littering in the Lovell case was intended to refer to the littering by the person charged with violation of the ordinance, not by others.

Since street meetings may not be prohibited, because listeners may resort to violence, so distribution may not be prohibited, because recipients may litter.

The evil can be prevented by punishing the actual wrongdoers.

Petitioner was convicted of distribution, resulting in littering, he was charged only with distribution.

This violates due process of law.

It is analogous to the question in the De Jonge case.

It is undisputed that the City of Milwaukee has refrained from arresting those who littered the streets, but has arrested distributors.

This is discriminatory administration.

It renders the ordinance invalid, if it were otherwise valid.

POINT I.

Appellant's Conviction Was Without Due Process of Law in Violation of His Right of Freedom of Speech and of the Press.

This Court having, in *Lovell v. Griffin*, 303 U.S. 444, ruled that the Fourteenth Amendment protects leaflet distribution, the question now arises whether such pro-

tection can be destroyed under the pretext of preventing the littering of streets. That municipalities may punish street littering is, of course, not disputed. But in the case at bar the offense charged was not littering, but distribution. Respondent justifies the charge on the ground that littering resulted from the distribution. It is, however, not claimed that appellant himself littered the streets, and indeed the evidence is to the contrary. The only claim is that some of the persons who accepted the literature which appellant handed out, subsequently threw it away (R. 14).

If the offense charged against appellant had been littering and the proof had been only that here adduced, serious questions of proximate cause would have been raised. However, since the offense charged was not littering, but distribution, the conviction can be upheld only if a municipality may prohibit an act harmless in itself on the theory that in some instances harm may result from that act. It is submitted that this Court has, in *Stromberg v. California*, 283 U.S. 359, ruled otherwise. In that case a conviction for display of a red flag in "opposition" to government was reversed because the statute made no distinction between opposition manifested by lawful means or such opposition when manifested by unlawful ones. A similar view was expressed by Mr. Justice Roberts in *Herndon v. Lowry*, 301 U.S. 242 at page 259:

> "And where a statute is so vague and uncertain as to make criminal an utterance or an act which may be innocently said or done with no intent to induce resort to violence or on the other hand may be said or done with a purpose violently to subvert government, a conviction under such a law cannot be sustained."

So in the case at bar the statute punishes distribution unaccompanied by littering, as well as distribution which has such consequences.

But, if it be argued that the State Court has, by its construction of the ordinance, limited its application to distribution actually accompanied by littering (see R. 23), we nevertheless believe that the ordinance violates constitutional guaranties. Justification for an ordinance of this more limited character is sought in the police power. And it is argued that, since municipalities have the right to prevent littering, the courts may not inquire whether the means used are appropriate or necessary. With this principle of judicial self-restraint (compare Mr. Justice Stone dissenting in *United States v. Butler*, 297 U.S. 1 at 78) counsel would be the last to disagree. But it is submitted that this principle has no application to the problem now before the Court.

For when the police power comes into conflict with the basic democratic rights of freedom of religion, press and assembly, the conflict must be resolved in different terms. See suggestion by Mr. Justice Stone in *United States v. Carolene Products Co.*, 304 U.S. 144, 152, note 4. This Court, in the *Lovell* case, recognized the importance in American life of the political pamphlet. In these troubled times the free distribution of varying points of view is of the utmost importance. There are many groups in the community, religious, political or economic, who are not able to command either the radio or the press for the distribution of their ideas. The only way that they can be heard is by the distribution of leaflets and pamphlets. Such distribution, in order to reach the general public, must be on the public streets. It is absurd to suppose that any effective circulation of minority opinion is possible in communities where ordi-

nances of the kind now under review are permitted to operate. The contention that such ordinances are directed against littering and not against distribution is specious and should not receive the sanction of this Court. To stop littering no such drastic ordinance is needed.

To say that the courts may not consider the necessity for the restriction upon freedom of speech and of the press because of a claim that the police power has been exercised would result in the destruction of such basic rights. Therefore, restriction of these rights is permissible only when necessary to prevent serious evil to the state. That was recognized in *Stromberg v. California*, supra, where the Court upheld part of the statute there under consideration because it punished incitement to the overthrow of organized government by unlawful means.

In *De Jonge v. Oregon*, 299 U.S. 353, the Chief Justice said:

> "These rights may be abused by using speech or press or assembly in order to incite to violence and crime. The people through their legislatures may protect themselves against that abuse. But the legislative intervention can find constitutional justification only by dealing with the abuse. The rights themselves must not be curtailed.
>
> "The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government."

In *Herndon v. Lowry*, supra, this Court held unconstitutional a statute which punished an attempt to incite insurrection by persuasion because the utterances upon which the prosecution rested were themselves not unlawful. Mr. Justice Roberts, speaking for the majority of the Court, rejected the contention of the state in that case that utterances having a "dangerous tendency" could be punished. He said:

> "The power of a state to abridge freedom of speech and of assembly is the exception rather than the rule and the penalizing even of utterances of a defined character must find its justification in a reasonable apprehension of danger to organized government. The judgment of the legislature is not unfettered. The limitation upon individual liberty must have appropriate relation to the safety of the state. Legislation which goes beyond this need violates the principle of the Constitution."

And applicable to this situation is also the statement of Mr. Justice Holmes in *Schenck v. United States*, 249 U.S. 47 at page 52:

> "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree."

It has long been a rule of this Court that the question of the necessity of an alleged police power regulation is ultimately for the court to decide.

> "Prohibitory legislation has repeatedly been held invalid, because unnecessary, where the denial of liberty involved was that of engaging in a particular business. The power of the courts to strike down an offending law is no less when the interests in-

volved are not property rights, but the fundamental personal rights of free speech and assembly."

Whitney v. California, 274 U.S. 357, concurring opinion of Messrs. Brandeis and Holmes, J. J., 372.

See also

Weaver v. Palmer Bros., 270 U.S. 402, 410.

Even before the decision of this Court in the *Lovell* case there had been numerous decisions declaring unconstitutional similar ordinances. The earliest of these was *People v. Armstrong*, 73 Mich. 288, 41 N.W. 275 (1889).

See to like effect *City of Chicago v. Schultz*, 341 Ill. 208, 173 N.E. 276 (1930); *Ex parte Pierce*, 127 Tex. Cr. 35, 75 S.W. 2nd 264 (1934); *In re Cox*, 122 N.J. L. 150 (1937); *New Rochelle v. McCormick*, West. L. J. June 11, 1935, p. 997. See also various unreported cases, such as *City of Newark v. Hill*, 1, I. J. A. Bull. No. 12, p. 2; *People v. Toth*, 2 I. J. A. Bull. No. 5, p. 2; *People v. Goren*, 4 I. J. A. Bull. No. 3, p. 3; See also 5 I. J. A. Bull. p. 147, ¶ cf.; *Star Company v. Brush*, 185 App. Div. 261, 172 N.Y. Supp. 851 (1918); *Dearborn Publishing Company v. Fitzgerald*, 271 F. 479 (1921); *In re Campbell*, 64 Calif. App. 300, 221 Pac. 952 (1923); *People v. Armentrout*, 118 Calif. App. 761, 1 P. 2nd 556 (1931).

In some cases the courts have limited the application of similar ordinances to commercial literature on the ground that any application of the ordinances to pamphlets generally would be an unconstitutional deprivation of free speech. *See People v. Johnson*, 117 Misc. 133, 191 N.Y. Supp. 750 (1921); *Coughlin v. Sullivan*, 100 N. J. L. 42, 162 A. 177 (1924).

Since the decision of this Court in the *Lovell* case, there have been decisions to like effect. In *C.I.O. v. Hague*, 25 F. Supp. 127, Judge Clark of the District Court of New Jersey considered that case controlling with regard to an ordinance of Jersey City which banned the distribution of leaflets on streets and public places. He recognized that ordinances having the broad sweep of the ordinance now before the Court are designed rather to restrict the circulation of ideas than to prevent the littering of streets, saying:

> "The strategy in the use of ordinances designed and phrased to protect the streets against being littered with the consequent clogging of sewers, fire and disease hazards and the traditional frightening of horses, for the purpose of protecting the minds of the people who walk those streets against being littered with certain kinds of ideas and again, traditionally perhaps, being frightened."

In the Circuit Court of Appeals this portion of the decree of the District Court was unanimously upheld. Judge Biggs held the ordinance to be "squarely within the decision" of the *Lovell* case.

In this Court also the ordinance was held void on its face within the *Lovell* case. (*Hague vs. C.I.O.*, 59 Sup. Ct. 954, 965). Indeed this Court struck out from the decree of the Court below (see 101 F. 2nd 774 at 795) provisions which so restricted the injunction that it would not be applicable where the leaflets were distributed in such a way as to cause littering of the streets.

In *People v. Taylor*, the Appellate Department of the Superior Court of California, for the County of San Diego (not yet reported), affirmed a dismissal of a charge based on an ordinance which, like the ordinance now before the Court, prohibits the distribution of leaflets upon

any street, park or public place. See also *People ex rel Gordon v. McDermott*, 169 Misc. 743; *People v. Gilione*, 3 L.R.R. 597 (1938); *People v. Finkelstein*, 4 L.R.R. 77 (1939). For other unreported cases see 7 I. J. A. Bull. No. 1, p. 4. (numbered 162 in error)

On the other hand, in addition to the case at bar, and the two other cases now before this Court, a contrary result was reached by the Appellate Department of the Superior Court in California in the case of *People v. Jones*. (See Los Angeles Daily Journal, August 9, 1938, and 7 I. J. A. Bull. p. 31. See also unreported cases cited in foot-note 15 on page 32).

These decisions rested in part on earlier decisions in the same jurisdictions, in part on an attempted distinction between the ordinances in question and the ordinance involved in the *Lovell* case. The earlier cases relied on are in the main inapplicable. Thus in the case at bar the Court relied upon *Milwaukee v. Kassen*, 203 Wis. 383; 234 N.W. 352; in the *Nichols* case the Court relied on *Commonwealth v. Kimball*, 1938 Mass. Adv. 267, 13 N.E. 2nd, 18; in the *Young* case the Court relied on *People v. St. John*, 108 Calif. App. 779, 288 Pac. 53; *Sieroty v. City of Huntington Park*, 111 Calif. App. 377, 295 Pac. 564, and *San Francisco Shopping News Company v. City of South Francisco*, 69 F. 2nd 879, certiorari denied 293 U.S. 606, in addition to the cases already cited, and also *In re Anderson*, 69 Nebr. 686, 96 N.W. 149.

In the *Kassen* case the Court rested its conclusion largely on the *Anderson* case; besides appellant conceded the validity of the ordinance. In the *Kimball* case the constitutional issues were given scant consideration by the Court. In the *Sieroty* case and the *San Francisco Shopping News Company* case no question of free speech

was involved or even discussed, since the ordinances were aimed only at advertising matter. In the *St. John* case, which also dealt only with advertising matter, the Court expressly doubted whether it would be possible to prohibit distribution of religious and political pamphlets without interfering with the constitutional guaranty of free speech.

The *Anderson* case, which is the chief reliance of the prosecution in all these distribution cases, is really not an authoritative decision at all. It is clear that the defendants in the *Anderson* case actually caused littering since the Court distinguished between their acts which constituted distribution "upon the sidewalk" and other acts prohibited by the ordinance, namely, the handing of circulars to others on the public streets. But in any event the weight of authority, as indicated by the cases previously cited, is against the proposition that *distribution*, as distinguished from *littering*, can be prohibited. It is interesting to note, moreover, that in the *Anderson* case the Court justified its conclusion by citing *Commonwealth v. Davis*, 162 Mass. 510. The *Davis* case was considered to be authority for the view that a statute forbidding public meetings in a public park violated no rights of free speech—this Court has now repudiated that view in the *Hague* case.

The chief distinction attempted in the three cases now before this Court is that the ordinance in the *Lovell* case applied to distribution *throughout the city limits*, whereas the ordinances in the other cases applied only to distribution *on the city streets*. It is submitted that that distinction has no validity. Many of the cases cited above held ordinances unconstitutional which were restricted only to distribution on the streets or in public

places. Such, notably, was the situation in *Hague v. C.I.O.* supra.

The second ground of distinction taken is that the ordinance in the *Lovell* case was not aimed at street littering, whereas the ordinance in the case at bar was so aimed. However, the ordinance in the case at bar is an absolute prohibition not confined to distribution resulting in littering.

In support of that argument reliance is placed in the case at bar (R. 22) on the statement by the Chief Justice in that case. It is submitted that the reference in that opinion to littering of the streets was intended to refer to the littering of streets by the person charged with the violation of the ordinance. In the case at bar the ordinance is not limited to distribution accompanied by street littering on the part of such distributor.

Moreover, in order to prevent street littering, means other than the complete prohibition of distribution can be employed. Municipalities can provide receptacles for waste paper, they can increase their street cleaning force, they can probably most effectively stop street littering by arresting the actual litterers.

Finally, there is an underlying fallacy in the argument that leaflet distribution may be prohibited because of the possible littering by the recipients. By the same logic it could be argued that all street meetings could be prohibited because of the possibility that listeners to the speakers may obstruct traffic or because some of the listeners may offer violence to the speaker. This last, indeed, was the argument advanced by Mayor Hague in the *C.I.O.* case above referred to which has met with rebuff from this Court. In all these situations the evil

which the municipality may correct, namely, street littering, obstruction of traffic or disorderly conduct, can be prevented by the punishment of those actually committing the wrong, not by prohibition of a lawful act. As a speaker, whose address is lawful, is entitled to police protection against persons who might break up his meeting and cannot be arrested as a disturber of the peace, even though others use his speech as a pretext for violence, so the distributor of a pamphlet entirely lawful in its contents should not be subject to arrest because someone who accepts the pamphlet from his hands later throws it away.

POINT II.

Defendant's Conviction Was Without Due Process of Law in That He Was Not Charged With the Offense of Which He Was Convicted.

Appellant in the case at bar was charged with the violation of an ordinance which prohibited distribution of literature (R. 20). He was convicted of having distributed the literature in a manner such that street littering resulted (R. 6, 23). The Court expressly stated that a conviction based on distribution alone could not have been sustained, yet appellant was at no time charged with littering or even with distribution which produced or caused littering.

Even if it be assumed, as has been done in the foregoing discussion, that a statute is constitutional which punishes distribution because of the littering which may result from such distribution, it is submitted that the conviction in the case at bar fails to meet the requirements of due process of law.

It is settled that it is not only the interpretation of the statute which controls, but also the manner in which the statute is applied to the facts in the particular case. See *Herndon v. Lowry*, supra. Therefore, even if the statute as construed is constitutional so that a distributor might be punished upon proof of littering caused by others, nevertheless he cannot be so punished unless he is charged with such offense. If, as claimed by the prosecution this ordinance could be upheld as valid because it has been interpreted to apply only to cases where the distribution produces littering, then the charge should have been as broad as the ordinance. To charge a person with distribution and to convict him of distribution resulting in littering is in itself a denial of due process. See the statement of the Chief Justice in the *deJonge* case, supra, at page 362.

In the *deJonge* case defendant had been charged with speaking at a meeting, not with anything which he did at the meeting. There was some evidence to indicate that he had distributed literature at the meeting containing illegal statements. An attempt was made at the argument of the case in this Court to suggest that the conviction could be justified on the basis of this evidence, but it was clearly pointed out by several of the Justices during the argument that no such conviction was permissible since no such charge had been made. And in his opinion the Chief Justice characterized such a possibility "as sheer denial of due process." So, in the case at bar, it would be such sheer denial to justify a conviction on proof of littering in a case where the complaint contained no reference whatever to littering. Surely defendant had a right to suppose that he was being charged with distribution only and to secure an acquittal because such distribution was wholly lawful.

POINT III.

Defendant's Conviction Should Be Set Aside Because the Ordinance Has Been Enforced in a Discriminatory Manner.

It is undisputed in the case that it has been the policy of the police department, in enforcing this ordinance, not to arrest any persons who throw circulars or handbills on the streets or public places, but to arrest the distributors who hand them out (R. 9, 11, 14). The evidence also showed that this was the practice followed with reference to petitioner and the other defendants. It has been the consistent policy of the City of Milwaukee to ignore that part of the ordinance which would have effectively prevented littering of the streets, and to enforce the prohibition against distribution, notwithstanding that the distributor did nothing but distribute.

The rule of law with reference to unconstitutional administration is not logically or rationally limited to discrimination on account of race or color. It is the doctrine of this Court that

> "A valid law may be wrongfully administered by officers of the state so as to make such administration an illegal burden and exaction upon the individual."
>
> *C. B. & Q. R. Co. v. City of Chicago*, 166 U.S. 226, 233 et seq., 17 Sup. Ct. 581, 41 L.Ed. 979.

Discriminatory administration of otherwise apparently valid laws renders them unconstitutional.

> *Yick Wo v. Hopkins*, 118 U.S. 356;
> *Crowley v. Christensen*, 137 U.S. 86, 91, 11 Sup. Ct. 13, 34, L. Ed. 620;
> *Raymond v. Chicago Union Traction Co.*, 207 U.S. 20, 35, 28 Sup. Ct. 7, 52 L. Ed. 78;

Ah Sin v. Wittmann, 198 U.S. 500, 26 Sup. Ct. 767, 49 L. Ed. 1142;

Dobbins v. Los Angeles, 195 U.S. 223, 240, 49 L. Ed. 169.

The City has not only not enforced the law against those who actually littered the streets, but it has never enforced it against general distribution on the public streets of newspapers and periodicals, notwithstanding the express language of the act by which it applies to all printed matter.

There is apparent the discriminatory administration as against the impecunious citizens, the poor minority, which cannot afford to buy space in our expensive newspapers and periodicals to express its views to its fellowmen. The labor union, as in the instant case, does not generally have the money to make use of the high-priced privately owned press of the country to disseminate its views. The poor religious sect, the sincere and self-sacrificing social reformer, the political liberal and others not of financial ability to spend large sums to distribute their opinions, views and beliefs, are denied the only feasible method of using their constitutional right to disseminate their views. Such method of enforcement creates the unconstitutional condition which renders the law invalid.

CONCLUSION

It is, therefore, respectfully submitted that the judgment of conviction should be reversed and the complaint dismissed.

Respectfully submitted,

A. W. RICHTER and
OSMOND K. FRAENKEL,
Counsel for Petitioner.

FILE COPY

IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1938.

HAROLD F. SNYDER, Petitioner,

vs.

CITY OF MILWAUKEE, Respondent.

No. [redacted] 18

RESPONDENT'S BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN

WALTER J. MATTISON,
Counsel for Respondent
City of Milwaukee

INDEX

Cases Cited

Text Books Cited

Ordinance Cited

IN THE

SUPREME COURT OF THE UNITED STATES,

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HAROLD F. SNYDER, Petitioner,

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CITY OF MILWAUKEE, Respondent.

No.....

RESPONDENT'S BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI

to the Supreme Court of the State of Wisconsin

The decision and judgment below is officially reported in **City of Milwaukee v. Harold F. Snyder,** 283 N. W. 301, (decided January 10, 1939). (R. 20)

STATEMENT OF THE CASE

The question raised in this proceeding is the validity of Section 865 of the Milwaukee Code of 1914, which prohibits, among other things, the distribution

of handbills, circulars, dodgers or advertising matter upon the streets, sidewalks, alleys, wharves, public grounds, etc., within the City of Milwaukee. This ordinance is set out in full on page 7 of the printed record.

The petitioner was charged with violating that portion of the City of Milwaukee ordinance which makes it unlawful "* * * to circulate or distribute any circular, handbills, cards, posters, dodgers or other printed or advertising matter * * * in or upon any sidewalk, street, alley, wharf, boat landing, dock or other public place, park or ground within the City of Milwaukee." Upon conviction the petitioner appealed to the Supreme Court of the State of Wisconsin, where the decision of the Trial Court was sustained. (R. 20)

REASONS RELIED UPON BY PETITIONER FOR ALLOWANCE OF WRIT

The petition sets forth on pages 4 and 5 four alleged reasons therefor, but as we read the same, it appears that the petitioner relies on one relevant proposition that the Supreme Court of the State of Wisconsin, a court of last resort, has decided a federal question in a way in conflict with applicable decisions of this Court, principally **Lovell v. City of Griffin**, 303 U. S. 444, 82 L. Ed. 660, 58 S. Ct. 666. As to the other reasons for allowance of the writ relied upon by petitioner, they are irrelevant in this proceeding. They may be disposed of as follows:

1. The fact that there are other cases involving the constitutionality of handbill ordinances on appeal before this Honorable Court is irrelevant in consideration of the Milwaukee ordinance, because there it cannot be expected that decisions of state courts in these matters would be uniform.

2. Whether or not the immediate question is of concern throughout the United States is also irrelevant, because the question involves merely the right of a municipality to enact an ordinance as a legitimate and reasonable means of regulation of its streets and highways.

3. Whether or not the decision of the Supreme Court of Wisconsin complained against is contrary to the decisions of the Supreme Courts of or of some courts in other states is also irrelevant. However, the great weight of authority sustains the validity of the Milwaukee ordinance.

These three reasons are merely restatements of one reason which is not persuasive.

ARGUMENT IN OPPOSITION TO PETITION FOR CERTIORARI

I

This case is not ruled by Lovell v. Griffin.

The decision of **Lovell v. City of Griffin**, 303 U. S. 444, 82 L. Ed. 660, 58 S. Ct. 666, relied upon by the petitioner, merely holds invalid an ordinance that in effect attempts to exercise a pre-publication control under the guise of regulation. However, the principle is recognized in cases upholding limitations upon the distribution of handbills, as for example, those upholding an ordinance against littering the streets with circulars.

The opinion of the Court by Chief Justice Hughes held that the ordinance in question is not limited to "literature" that is obscene or offensive to public morals, nor to methods of distribution "which might

be regarded as inconsistent with the maintenance of public order, or as involving disorderly conduct, by molestation of the inhabitants or the misuse or littering of the streets."

The identical ordinance involved in the instant case was sustained by the Wisconsin Supreme Court as a valid and constitutional police regulation aimed at preventing the "misuse or littering of the streets." **Milwaukee v. Kassen,** 203 Wis. 383, 234 N. W. 352. The exact ordinance complained of in the instant case formed the basis of the decision in that case. It was held to be a valid and constitutional enactment. The rule as laid down there has not been modified in any respect.

It might be mentioned that there is no interference of the right of free speech or free press in this handbill ordinance of the City of Milwaukee, which is directed solely at the littering of the streets.

This leaves for consideration the sole question of whether the rule laid down in **Milwaukee v. Kassen,** 203 Wis. 383, has been abrogated and overcome by the decision of this Court in **Lovell v. Griffin.** A comparison of the ordinances in the two cases discloses that they are clearly distinguishable inasmuch as the ordinance in the **Griffin** case attempted to delegate to the city manager of Griffin the legislative power of the city council to determine the standards to be applied in any individual case which might arise, plainly an attempt at pre-publication censorship. This distinction has been laid down in the cases of **People v. Young,** (Dec. 9, 1938) 85 P. (2nd) 231, which involves the constitutionality of a Los Angeles handbill ordinance; **Commonwealth v. Nichols,** (December 21, 1938) Mass. Adv. Sheets (1938) 1969, 18

N. E. (2nd) 166, which involves the constitutionality of a handbill ordinance of Worcester, Massachusetts; and **Commonwealth v. Kimball**, Mass. Adv. Sheets (1938) 267, 13 N. E. (2nd) 18, 114 A. L. R. 1440, which involves the constitutionality of a handbill ordinance of another Massachusetts municipality. These cases followed the Wisconsin cases which already had held this identical ordinance a valid enactment.

Other cases, sustaining regulations similar to those in the Milwaukee ordinance contained, follow:

People v. Horwitz, 27 N. Y. Criminal Reports 237, 140 N. Y. S. 437, 439; where the Court held valid an ordinance which provided:

> "That no person shall throw, cast or distribute in or upon any of the streets or public places, or in front yards or stoops, any handbills, circulars, cards or other advertising matter whatsoever."

Allen v. McGovern, 169 A. 345 (N. J. 1933) involving an ordinance prohibiting distribution of unsolicited advertising matter to householders, where the Court held that it was not unconstitutional as unreasonable interference with the right to choose an occupation and to advertise merchandise.

Goldblatt Bros. Corporation v. City of East Chicago, Indiana, (1937) 211 Ind. 621, 6 N. E. (2d) 331. The ordinance there prohibited the distribution of advertising matter by placing the same in automobiles, yards, porches, mail boxes, etc., not in possession or under the control of the person, etc., so distributing, newspapers being exempted from the provisions of the ordinance, and in sustaining the ordinance the Court said:

"The evident purpose of this clause is to enable the city to prevent unwholesome or waste materials from accumulating upon private property. One of the most reasonable means of accomplishing this end is to prevent the unauthorized throwing of substances, which may become waste material, upon private property. It is obvious that the more waste accumulated, the more the expense of the city or property owner in removing it. * * * A city has unquestioned right to remove garbage, ashes, debris, and waste matter that collects upon the property of its citizens. The prevention of unnecessary scattering of material that may become waste is a protection to the municipality itself, since, if waste matter is minimized, the expense of removing it will be less."

In this case the Court also held that the appellant had no property right in the privilege of distributing handbills and advertising matter.

Assuming for the sake of argument that the case of **Lovell v. Griffin,** 303 U. S. 444, 82 L. Ed. 660, 58 S. Ct. 666, is substantially in conflict with the construction of the Milwaukee handbill ordinance and the ruling of the Wisconsin Supreme Court on its validity in the case of **Milwaukee v. Kassen,** 203 Wis. 383, what must be the ruling by the Supreme Court in the instant case? The rule which has been consistently handed down by the Supreme Court of the United States is to the following effect:

"The general rule is that the construction (of a state statute) given by the highest court is conclusive on the Supreme Court of the U. S. where the question involved is whether such statute is repugnant to the federal constitution; and when such interpretation renders it constitutional and valid legislation it will not be disregarded by the U. S. Supreme Court, and a different construction given to the statute which will make it repugnant

to the federal constitution." (6 Ruling Case Law, 86 (Const. Law, Section 85).)

Also:

Marine Nat. Exchange Bank v. Kalt-Zimmers Mfg. Co., 293 U. S. 357, 361, 79 L. Ed. 427, 432;

Bandini Petroleum Co. v. Superior Ct., 284 U. S. 8, 78 A. L. R. 826, 833.

II

There is no conflict in authority that requires the issuance of a writ of certiorari.

There is in fact no conflict between the decision of this Court in the case of **Lovell v. Griffin** and the instant case **City of Milwaukee v. Snyder**, (January 10, 1939), 283 N. W. 301, or **Milwaukee v. Kassen**, 203 Wis. 383 (1931), 234 N. W. 352, in which the Wisconsin Supreme Court upheld the validity of the same Milwaukee ordinance.

It is clear that the right to speak and to publish freely is not absolute, but may be subjected to reasonable restrictions upon the time, place and content of its exercise; abuses arising out of such freedom may be punished in the exercise of police regulations.

Petitioner argues that the remedy for littered streets is not to prohibit the distribution of handbills, but to enforce the laws against letting them fall on the street or sidewalk. In order to prevent the accomplishment of something regarded as an evil, effectively, it is often best to prohibit an act which might be innocent in itself, but may lead to the evil. This Court stated in **Purity Extract & T. Co. v. Lynch**, (1912) 226 U. S. 192, 33 S. Ct. 44, 46, 57 L. Ed. 184, 187:

"It does not follow that because a transaction, separately considered, is innocuous, it may not be included in a prohibition the scope of which is regarded as essential in the legislative judgment to accomplish a purpose within the admitted power of government. (Cases cited.) With the wisdom of the exercise of that judgment the court has no concern; and unless it clearly appears that the enactment has no substantial relation to a proper purpose, it cannot be said that the limit of legislative power has been transcended."

Consequently there is no conflict in authority that justifies the issue of a writ of certiorari in face of the fact that the individual's exercise of free expression may incidentally seem to be curbed by forbidding the distribution of handbills on public streets.

San Francisco Shopping News Co. v. City of South San Francisco, 9 Cir., 1934, 69 F. (2d) 879, certiorari denied 293 U. S. 606, 55 S. Ct. 122, 79 L. Ed. 697.

In **Thomas Cusack Company v. City of Chicago,** 242 U. S. 526, 61 L. Ed. 472, involving the question of the constitutionality of a billboard ordinance, the Supreme Court held the ordinance to be valid and constitutional. The Court said:

"We therefore content ourselves with saying that while this court has refrained from any attempt to define with precision the limits of the police power, yet its disposition is to favor the validity of laws relating to matters completely within the territory of the state enacting them, and it so reluctantly disagrees with the local legislative authority, primarily the judge of the public welfare, especially when its action is approved by the highest court of the state whose people are directly concerned, that it will interfere with the action of such authority only when

it is plain and palpable that it has no real or substantial relation to the public health, safety, morals, or to the general welfare. **Jacobson v. Massachusetts,** 197 U. S. 11, 30, 49 L. Ed. 643, 651, 25 Sup. Ct. Rep. 358, 3 Ann. Cas. 765."

III

Decisions relied upon by petitioner do not disclose a conflict in authority.

The case of **People v. Armstrong,** 73 Mich. 288, 41 N. W. 275, found on page four of petitioner's brief, involved the distribution of Y. M. C. A. circulars. The record shows that there was no littering of the streets by the handbills.

C. I. O. v. Hague, Mayor, 25 F. Supp. 127, is not in point because in that case the mayor attempted to act as sole arbiter as to who should have the right to distribute circulars or to conduct meetings; which right to circularize handbills or conduct meetings was dependent upon the mayor's approval of such meeting or handbill.

The City of Milwaukee, however, is not interested in the contents of circulars or what political or economic doctrine may be expounded therein.

The purpose of the Milwaukee ordinance was the lawful purpose of preventing littering of the streets. Such construction was made by the Wisconsin Supreme Court in **Mittleman v. Nash Sales, Inc.,** 202 Wis. 577.

The method of enforcement of the 1914 Milwaukee ordinance is a legitimate and reasonable means of regulation. The method of enforcement by law officers of the City does not affect its validity.

In **Manos v. City of Seattle**, et al., 146 Wash. 210, 262 P. 965, it was argued that the administration of a Seattle ordinance had been discriminatory, but the Court said:

> "The ordinance itself does not permit of discrimination between persons on the part of the officers whose duty it is to enforce it, and the remedy for its mal-administration on their part is not to declare the ordinance void. Few laws would have force or effect if their validity depended upon the question whether they were always impartially administered."

It was held in **Marblehead Land Co. v. Los Angeles** (U. S. C. C. A.) 47 F. (2d) 528, 532, affirming 36 F. (2d) 242, that when the unreasonableness or arbitrariness in the exercise of the police power is fairly debatable, courts will sustain the ordinance.

A police ordinance will be sustained unless it appears that it bears no relation to public health, safety, morals, or welfare. **Pacific Railways Advertising Co. v. Oakland**, 98 Cal. App. 165, 276 P. 629. In the instant case the Court found that the ordinance was enacted in the public welfare; that is, to prevent misuse of, befouling of, and littering of streets. The case of **Milwaukee v. Kassen**, 203 Wis. 383, is controlling in that respect as having interpreted the identical ordinance under identical circumstances as are in the instant case, where the Supreme Court of the State of Wisconsin declared that the ordinance was aimed at the littering of the streets, citing a previous Wisconsin decision.

Counsel for petitioner cites the case of **Yick Wo v. Hopkins**, 118 U. S. 356, 30 L. Ed. 220, 227, found on page 18 of his brief, as holding that notwithstanding

the fact that a law may be fair on its face, if the method of administration is discriminatory and deprives the persons of their constitutional rights, this renders the law invalid under the Fourteenth Amendment of the United States Constitution. In the **Yick Wo** case, 118 U. S. 356, an ordinance was involved pertaining to the regulation of laundries admittedly enforced only against the Chinese. The court held that the unjust discrimination constituted a "denial of equal justice" within the prohibition of the constitution.

No claim is made in the instant case that there is any discrimination as to any known class or group of persons against whom the ordinance is enforced. On the contrary, the testimony was clear that where there was a violation of the law, that is where littering of the streets was caused by any person distributing handbills, that the police department of the City of Milwaukee would be vigilant in preventing any such violation of the city code.

It is apparent from the record in this case that there was no such thing in the enforcement of the Milwaukee ordinance as would indicate arbitrary or unjust discrimination in favor of one class as against another class. The police department, using the ordinary understanding of the word "distribute," interpreted it to mean the passing out of handbills on the streets, highways, alleys, and public places of the City of Milwaukee. (R. 17)

An isolated instance of where one individual, having received a handbill, inadvertently permits it to fall to the pavement, would certainly not constitute littering the streets, the word "littering" meaning the falling of more than one, or numerous handbills to the pavement.

The uncontroverted testimony indicates that there was littering on Vliet Street at the Place alleged by the city. (R. 14)

CONCLUSION

Neither the petition nor the brief in support thereof has disclosed a question of sufficient importance or conflict of authority, or that the Supreme Court of the State of Wisconsin has decided a federal question in a way in conflict with applicable decisions of the United State Supreme Court so as to require the issuance of the writ of certiorari. There is no doubt but that the ordinance was enacted under ample authority.

It is clear that the means adopted by the enforcement authorities was a legitimate and reasonable means of regulation directed solely at the littering and misuse of the public streets. The Wisconsin Supreme Court in three cases, **Mittleman v. Nash Sales, Inc.**, 202 Wis. 577, **Milwaukee v. Kassen**, 203 Wis. 383, 234 N. W. 352, and **Milwaukee v. Snyder**, (January 10, 1939) 283 N. W. 301, has determined that the Milwaukee ordinance is constitutional.

The general rule is that the construction of a state statute given by the highest state court is conclusive on the Supreme Court of the United States where the question involved is whether such statute is repugnant to the federal constitution; and for such interpretation rendered constitutional and valid legislation it will not be disregarded by the United States Supreme Court and a different construction given to the statute which will make it repugnant to the federal constitution. 6 **R. C. L.** 86, Constitutional Law, Section 85.

We respectfully submit, therefore, that the decision of the Wisconsin Supreme Court upholding the decision of the trial court, the Circuit Court of Milwaukee County, does not commend this case for review on writ of certiorari under the rules and decisions of this court.

Respectfully submitted,

WALTER J. MATTISON,
Counsel for Respondent
City of Milwaukee

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM — 1939

Number 18

HAROLD F. SNYDER,

Petitioner,

vs.

CITY OF MILWAUKEE,

Respondent.

BRIEF FOR RESPONDENT.

WALTER J. MATTISON,
Counsel for Respondent,
City of Milwaukee.

INDEX.

CASES CITED.

Cases Cited—*Continued.*

Cases Cited—*Continued.*

TEXT BOOKS CITED.

MILWAUKEE CODE CITED.

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM — 1939

Number 18

HAROLD F. SNYDER,

Petitioner,

vs.

CITY OF MILWAUKEE,

Respondent.

BRIEF FOR RESPONDENT

The decision and judgment below is officially reported in *City of Milwaukee vs. Harold F. Snyder*, 283 N. W. 301, decided January 10, 1939 (R. 20). This case affirms a prior decision on the identical ordinance reported in *Milwaukee vs. Kassen*, 203 Wis. 383.

The question raised upon this appeal is the validity of Section 865 of the Milwaukee Code of 1914, as amended. This ordinance prohibits the throwing of rubbish and dirt upon the streets of the city, and also prohibits the distribution of handbills, circulars, dodgers or advertising matter upon the streets, sidewalks, alleys, wharves, public grounds, etc. within the City of Milwaukee.

THE ORDINANCE.

The ordinance which has been in force and effect many years in the City of Milwaukee provides as follows:

"CHAPTER XVII.

HEALTH

ARTICLE 16

Garbage, Rubbish, Nauseous Substances and Odors Throwing Filth, Rubbish or Nauseous Substances on Streets, etc.

Section 865. It is hereby made unlawful for any person, firm or corporation, or for any officer, member, agent, servant or employe of any firm or corporation to place, throw or leave any slops, dirty water or other liquid of offensive smell, or otherwise nauseous or unwholesome, or any dead carcass, carrion, meat, fish, entrails, manure or other nauseous or unwholesome matter or substance, or any rubbish, ashes, paper, dirt, stones, bricks, manure, tin cans, boxes, barrels or other substances whatsoever or to circulate or distribute any circular, hand bills, cards, posters dodgers or other printed or advertising matter, or to drain or pour, or to permit to drain or flow oil, kerosene, benzine or other similar oil or oily substance or liquid, in or upon any sidewalk, street, alley, wharf, boat landing, dock or other public place, park or ground, within the City of Milwaukee. Provided, however, that this section shall not apply to any garbage, manure, ash boxes or receptacles, which are built and maintained not less than twelve inches above the grade of the alley, nor more than three feet from the line of any lot or parcel of land abutting upon any alley in said city. Said boxes so built and maintained shall be waterproof, and shall at all times be kept securely covered except when depositing or removing the contents therefrom."

STATEMENT OF FACT.

For the purpose of correcting inaccuracies and omissions in the statement of fact contained in the brief for petitioner, the respondent makes the following statement of fact.

On May 27, 1938, the defendant and petitioner stood at or near the Shinner Meat Market at 1306 W. Vliet Street, in the City of Milwaukee, Wisconsin, and distributed handbills to pedestrians on the street. The contents of the handbills pertained to a labor dispute with the Shinner Meat Market, the petitioner acting in the capacity of a picket (R. 2).

The petitioner had an armful of handbills and handed out these bills to persons walking by, some of the people dropping them on the sidewalk or in the gutter. Others walked several feet and then crunched them in their hands and threw them on the walk (R. 13).

Some of the handbills observed by the police officers were lying on the walk on the north side of Vliet Street. Some of them were lying in the gutter on the north side of Vliet Street (R. 13). The handbills which had been distributed by petitioner were lying around on the street and sidewalk in the vicinity. These were the handbills which had been given to various pedestrians by the petitioner and which were dropped by these pedestrians (R. 14).

There were numerous handbills of the same type lying on the south side of Vliet Street, in the gutter. Some of these on the street car tracks were run over by the wheels of the eastbound street cars. They were sticking to the track. Some of them were lying up against the safety zone on the southwest corner of 13th and Vliet Streets. There were dozens of handbills lying up against the gutter on the side of Vliet Street (R. 14).

This evidence was undisputed (R. 2).

ARGUMENT.

The City of Milwaukee, the respondent, contends that the ordinance in question is valid:

(1) Because the regulation of the use of streets, alleys, public places, etc., in the prevention of the littering of the streets and the promotion of the general welfare, health and safety of the residents of the city using the streets is a legitimate field for police regulation, and the City of Milwaukee has authority in respect to such matters;

(2) Because the means adopted by the Common Council as well as by the police department for enforcement of such ordinance, are legitimate and reasonable methods of regulation.

I.

The ordinance was enacted under ample authority.

The case of *Lovell vs. City of Griffin*, 303 U. S. 444, 82 L. Ed. 660, 58 Sup. Ct. 666, is greatly relied upon by appellant in his brief. The ordinance involved in the *Griffin* case was held to be pre-publication censorship and therefore unconstitutional in that it attempted to delegate to the city manager of the city of Griffin the power to censor but the court very specifically recognized the very principle on which the Wisconsin Supreme Court sustained the Milwaukee ordinance when Chief Justice Hughes was careful to state that the ordinance in question is not limited to "literature" that is obscene or offensive to public morals, nor to methods of distribution "which might be regarded as inconsistent with the maintenance of public order, or as involving disorderly conduct, by molestation of the inhabitants or the misuse or littering of the streets."

See also,

Philadelphia vs. Brabender, 201 Pa. 574, 51 Atl. 374 (1901).

The ordinance of the *City of Griffin* declared unconstitutional is as follows:

> "*Section 1.* That the practice of distributing, either by hand or otherwise, circulars, handbooks, advertising, or literature of any kind, whether said articles are being delivered free, or whether the same are being sold, within the limits of the City of Griffin, without first obtaining written permission from the city manager of the City of Griffin, such practice shall be deemed a nuisance, and punishable as an offense against the City of Griffin.
>
> "*Section 2.* The chief of police of the City of Griffin and the police force of the City of Griffin are hereby required and directed to suppress the same and to abate any nuisance as is described in the first section of this ordinance."

In the Wisconsin case of *Milwaukee vs. Kassen*, 203 Wis. 383, 234 N. W. 352, the court determined the handbill ordinance of the City of Milwaukee, Section 865 of the Milwaukee Code of 1914, as amended, was valid and constitutional. The exact language of the ordinance complained about in the instant case formed the basis of the decision in the *Kassen* case. The rule there laid down has not been modified in any respect.

This leaves for consideration the question of whether the rule laid down in *Milwaukee vs. Kassen* has been abrogated and overcome by the decision in the *Lovell vs. Griffin* case. This case is not ruled by *Lovell vs. Griffin*. A comparison of the ordinances in the two cases discloses that they are clearly distinguishable. The ordinance in the

Griffin case attempted to delegate to the city manager of Griffin pre-publication control under the guise of regulation. There is no interference of the right to free speech or free press in this "handbill" ordinance of the City of Milwaukee, which is directed solely at the littering of the streets.

San Francisco Shopping News Co. vs: City of South San Francisco, 9 Cir. 1934; 69 F. (2d) 879, certiorari denied 293 U. S. 606, 55 S. Ct. 122, 79 L. Ed. 697.

In the case of *In Re Thornburg*, 9 N. E. (2nd Series) (Ohio) 516, the ordinance in question prohibited the distribution of handbills, circulars, cards or other advertising by handing the same to pedestrians on a public alley, street or ground within a congested district of the city or by the placing of the same in or upon any motor vehicle in use or parked upon the streets in the said congested district and was declared to be a nuisance and unlawful. The constitutionality of the ordinance was sustained.

In the dissenting opinion Judge Terrell stated:

> "It can fairly be seen from a reading of the ordinance in question that two of the purposes for the enactment of this ordinance are, first, to prevent congestion of pedestrian traffic upon the sidewalks and streets in the congested districts of the city; and, second, to prevent the unnecessary cluttering of sidewalks and streets in congested districts with unwanted advertising matter. It reasonably follows that there is a great likelihood that advertising cards, handbills and circulars that are indiscriminately distributed free to people on the public highways, will result in cluttering the streets with such cards and papers which are unwanted. There is also a great likelihood that should the citizens deem such cards and circulars or other matter to have any value, there

might be a great clamor for the free gift thereof which would tend to cause obstructions of the sidewalks and the streets. No person has an inherent right to conduct his business upon the public streets and sidewalks of the city. The distributing of advertising circulars and cards is part of a business. The city council in the exercise of its police power may prohibit the carrying on of such business on the public streets and highways."

As a general rule whatever is contrary to public policy or inimical to the public interests is subject to the police power of the state.

In *People vs. Horwitz*, 27 N. Y. Criminal Reports 237, 140 N. Y. Suppl. 437, 439, the validity of the following ordinance was sustained:

> "That no person shall throw, cast or distribute in or upon any of the streets or public places, or in front yards or stoops, any handbills, circulars, cards or other advertising matter whatsoever."

In *Allen vs. McGovern*, 169 Atl. 345 (N. J. 1933) the ordinance prohibited distribution of unsolicited advertising matter to householders. It was held not unconstitutional as unreasonable interference with the right to choose an occupation and to advertise merchandise. The court stated:

> "City life is very complex. There can be no doubt that the city can prevent the misuse of the streets. But can it prevent the distribution to householders of unsolicited advertising matter? We think it can. * * *
>
> "Ordinances have been long upheld as within the police power when the design was to prevent the cluttering of the streets and the frightening of horses. * * * There are restraints upon everyone for the common good. The city commissioners, being familiar with the local conditions are primarily the judges of the necessity."

See also:

Jacobson vs. Mass., 197 U. S. 11, 25 S. Ct. 358, 49 L. Ed. 643.

In *Goldblatt Bros. Corporation vs. City of East Chicago*, Indiana (1937) 6 N. E. (2d) 331, the ordinance prohibited the distribution of written advertising matter by placing the same in automobiles, yards, porches, mail boxes, etc., not in possession or under the control of the person, etc. so distributing, newspapers being exempted from the provisions of the ordinance. The court said:

> "The evident purpose of this clause is to enable the city to prevent unwholesome or waste materials from accumulating upon private property. One of the most reasonable means of accomplishing this end is to prevent the unauthorized throwing of substances, which may become waste material, upon private property. It is obvious that the more waste accumulated, the more the expense of the city or property owner in removing it. * * * A city has unquestioned right to remove garbage, ashes, debris, and waste matter that collects upon the property of its citizens. The prevention of unnecessary scattering of material that may become waste is a protection to the municipality itself, since, if waste matter is minimized, the expense of removing it will be less."

In *McQuillin on Municipal Corporations* (2d Edition), Volume 3, Section 948, it is said:

> "Crowded urban populations require numerous police regulations which would be unreasonable in rural districts or sparsely populated territory. This difference was early recognized, and from the first establishment of public corporations, invested with civil government, the local community has been empowered to enact and enforce various kinds of such regulations which restrict more or less the liberty of

the individual, his personal movements and the use of his property. These are essential to the enjoyment of life in crowded centers. From the beginning their necessity has been sanctioned by the public authorities and they have been sustained generally by the courts."

Assuming, for the sake of argument, that the case of *Lovell vs. Griffin*, 303 U. S. 444, 82 L. Ed. 660, 58 Sup. Ct. 666, is substantially in conflict with the construction of the Milwaukee handbill ordinance and the ruling of the Wisconsin Supreme Court on its validity in the case of *Milwaukee vs. Kassen*, 203 Wis. 383, we believe this court will follow the Wisconsin decision. The rule which has been consistently handed down by this court is:

> "The general rule is that the construction (of a state statute) given by the highest court is conclusive on the Supreme Court of the U. S. where the question involved is whether such statute is repugnant to the federal constitution; and when such interpretation renders it constitutional and valid legislation it will not be disregarded by the U. S. Supreme Court, and a different construction given to the statute which will make it repugnant to the federal constitution.'" (6 Ruling Case Law, 86 (Const. Law, Section 85).)

Also:

Marine Nat. Exchange Bank vs. Kalt-Zimmers Mfg. Co., 293 U. S. 357, 361, 79 L. Ed. 427, 432;

Bandini Petroleum Co. vs. Superior Ct., 284 U. S. 8, 78 A. L. R. 826, 833;

Wolff Packing Co. vs. Court of Ind. Rel., 262 U. S. 522, 27 A. L. R. 1280, 1290;

Pierce Oil Corp. vs. Hopkins, 264 U. S. 137, 68 L. Ed. 593, 596;

C. M. & St. P. & P. R. Co. vs. Risty, 276 U. S. 567, 72 L. Ed. 703, 707, 27 R. C. L. 44-46.

Freedom of the press must of course in our political system be guaranteed and must be guarded against from subtle encroachments. However, like other constitutional rights, it is subject to reasonable rules formulated to serve the public interest and to prevent abuse in the manner of the exercise of the right, as long as the right itself is neither suspended nor abrogated. This principle has been many times recognized in recent decisions of this court.

Gitlow vs. New York, 268 U. S. 652, 666, 667;
Whitney vs. California, 274 U. S. 357, 371;
Stromberg vs. California, 283 U. S. 359, 368;
Near vs. Minnesota, 283 U. S. 697, 707, 708;
DeJonge vs. Oregon, 299 U. S. 353, 364;
Commonwealth vs. Blanding, 3 Pick. 304, 313;
Commonwealth vs. Libbey, 216 Mass. 356;
Commonwealth vs. Karvonen, 219 Mass. 30;
Commonwealth vs. Anderson, 272 Mass. 100, 106.

In the case of *Frend et al. vs. United States*, 100 F. (2d) 691 (decided October 31, 1938) the defendants were convicted of parading in the public streets in front of the Austrian or the German Embassy with a number of other persons, some of whom were carrying banners and placards which were intended and calculated to bring into contempt the German government. This was in the City of Washington, D. C. The defendants were convicted for violating a joint resolution of Congress prohibiting a display of flags, banners, placards or devices intended to bring any foreign government into public odium, within 500 feet of an embassy, legation or consulate in the District of Columbia. The court went on to say:

"The resolution, interpreted in the light of its purpose and according to the limitations of the Constitution, places no restriction upon speech or assembly except to the extent that they may constitute

offensive public demonstrations calculated to arouse passions and resentments in those governments with which we have official relations, and then only when such offensive conduct is committed upon the public streets immediately adjacent to embassies, legations, consulates, and other buildings used for official purposes by such governments. These are reasonable and proper restrictions. In them there is no abridgement of the right of speech or of assembly or of any other constitutional right of the citizen. It has never been considered that the right in the public to use the streets is unlimited or that it may be exercised in defiance of the laws of the United States or the States. On the contrary, it has always been considered that a municipality may control and regulate the use of the streets in the general good; and this has often been held to include the preventing of loud noises, shooting of guns, assembling of crowds, and the routing of parades. The control or prohibition of any of these things cannot be regarded as interfering with the constitutional right of assembly or of speech, U. S. C. A. Const. Amend. 1. Nor is there anything in the Fifth Amendment to the Constitution, U. S. C. A. Const. Amend. 5, which invalidates this exercise of the police power in the respects mentioned."

The decisions demonstrate conclusively that the construction of the ordinance given by the highest court of the State of Wisconsin relative to the validity of the ordinance in question as set forth in the cases of *Milwaukee vs. Kassen*, 203 Wis. 383, 234 N. W. 352, and *Mittleman vs. Nash Sales, Inc.*, 202 Wis. 577, as well as the instant case, would be binding upon the Supreme Court of the United States.

II.

A — The means adopted are legitimate and reasonable means of regulation.

Petitioner contends that the proof shows that the ordinance was being enforced in an unreasonable and discriminatory manner, and alleges if such is the case such practice on the part of the police department would fall within the condition of *Yick Wo vs. Hopkins*, 118 U. S. 356, 30 L. Ed. 220. The only testimony with reference to this respect, was given by the two police officers and the deputy inspector of police who testified that where handbills and circulars are littering the streets the policy of the police department is to arrest the "one who is the cause," the distributor of handbills in instances where handbills litter the streets. The testimony was clear that no one was arrested for distributing except in cases where the handbills distributed were observed to be littering the streets (R. 6 and 17).

In the *Yick Wo* case the ordinance there pertained to the regulation of laundries and was admittedly enforced only against the Chinese. This court held there was a denial of equal justice. However, the evidence did not show that the ordinance was being directed "at a class of persons for the purpose of suppressing the free expression of their views, rather than for the purpose of preventing the littering of the public streets" (Quotation from *Kassen* case id. p. 389). The counsel for petitioner in their brief admit that they do not dispute that municipalities may punish street littering (p. 8 of their brief). The testimony in the instant case was that there was actual littering of the streets caused by the distribution of handbills by the petitioner (R. 9, 10, 12, 13, 14).

There is no question, therefore, but that the method of enforcement of the ordinance by law officers of the City of Milwaukee was absolutely valid.

In *Manos vs. City of Seattle, et al.* (1927), 262 Pac. 965, it was argued that the administration of a Seattle ordinance had been discriminatory. The language of the court in the *Manos* case is strongly in favor of the contention of the City of Milwaukee. It is as follows:

> "There was evidence introduced tending to show that the city had issued licenses for dance halls within the prohibited area, and that the board of park commissioners had issued a license granting the privilege of conducting a public dance hall in one of the public parks. While we are not convinced that the evidence conclusively establishes the facts to which it was directed, but were we to concede that it did so, we could not conclude that it avoided the ordinance. The ordinance itself does not permit of discrimination between persons on the part of the officers whose duty it is to enforce it, and the remedy for its maladministration on their part is not to declare the ordinance void. Few laws would have force or effect if their validity depended upon the question whether they were always impartially administered."

It was held in *Marblehead Land Co. vs. Los Angeles* (U. S. C. C. A.), 47 F. (2d) 528, 532, affirming 36 F. (2d) 242, that when the unreasonableness or arbitrariness in the exercise of the police power is fairly debatable, courts will sustain the ordinance.

There can be no question in the instant case but that the ordinance was enacted for the public welfare; that is, to prevent misuse of, befouling of, and littering of the streets.

The case of *Milwaukee vs. Kassen*, 203 Wis. 383, is controlling upon the court in that respect as having interpreted the identical ordinance under identical circumstances as are presented in the instant case, where the Supreme Court of the State of Wisconsin declared that the ordinance did mean littering of the streets, citing a previous Wisconsin decision.

B — Practical construction.

From the force of circumstances and conditions necessarily arising in the administration of the affairs of the government, both state and national, it is evident that those who are charged with official duties, whether executive, legislative, or judicial, must necessarily construe the constitutions and laws in numerous instances. *Marbury vs. Madison*, 1 Cranch (U. S.) 137, 2 L. Ed. 60.

Every department of the government, i. e., the police department, invested with certain constitutional powers, must, in the first instance at least, be the judge of its powers, or it could not act.

It has been contended in this case that the enforcement of the Milwaukee handbill ordinance worked a hardship upon a certain group of persons, but it has been held in numerous instances in controlling cases that where a constitutional provision is plain and unambiguous, the fact that its enforcement may work great inconvenience or hardship to particular persons or a particular class furnishes no ground for courts, by construction, to prevent or evade its evident purpose. *People ex rel Darling vs. Warden of City Prison*, 154 App. Div. 413, 139 N. Y. S. 277.

As to a definition of the police power, it was said in *Cooley Constitutional Limitations* (6th Ed.), 704, quoting *Meadowcroft vs. People*, 163 Ill. 56, 65, 45 N. E. 303, that—

"The police power of a state, in a comprehensive sense, embraces its system of internal regulation by which it is sought not only to preserve the public order and to prevent offenses against the state, but also to establish for the intercourse of citizen with citizen, those rules of good manners and good neighborhood which are calculated to prevent a conflict of rights and to insure to each the uninterrupted enjoyment of his own so far as is reasonably consistent with a like enjoyment of rights by others."

Consequently the interpretation of true liberty and freedom means that a person may enjoy certain rights as long as they do not interfere with the paramount interest of the entire people or of fellow citizens. Where the ordinance, therefore, was enacted for the welfare of the people of Milwaukee as a health and cleanliness measure, the validity of the ordinance must be sustained.

Francis vs. People of Virgin Island, 11 Fed. (2d) 860, holds that freedom of the press or of speech is not unlimited but to be exercised with regard to other rights accorded the people.

Burkitt vs. Beggans (1928), 142 Atl. 181, 103 N. J. Eq. 7, holds that city authorities have discretion in granting or denying a permit to make public speeches on streets, not withstanding the constitutional guaranty of free speech.

People on Complaint of O'Connor vs. Smith, 188 N. E. 745, 263 N. Y. 255, sustains a city ordinance requiring a permit to expound atheism in public streets, is not unconstitutional as depriving exhorters of atheism of freedom of speech.

The court will observe that the Milwaukee ordinance uses the terms "circulate" and "distribute." The word

"distribute" is defined as to divide among several or many; to deal out; apportion; allot. *Young vs. Sinsabaugh*, 173 N. E. 784, 342 Ill. 82.

Great Atlantic and Pacific Tea Company vs. Morrissett (D. C. Va.), 58 Fed. (2d) 991, 993, holds that to "'distribute" is to divide among several or many.

It is apparent from these authorities there was no such thing in the enforcement of the Milwaukee ordinance as would indicate arbitrary or unjust discrimination in favor of one class as against another class. The police department, using the ordinary understanding of the word "distribute," interpreted it to mean the passing out of handbills on the streets, highways, alleys, and public places of the City of Milwaukee.

An isolated instance of where one individual, having received a handbill, inadvertently permits it to fall to the pavement, would certainly not constitute littering the streets, the word "littering" meaning the falling of more than one, or numerous handbills to the pavement. But the uncontroverted testimony in the instant case indicates that there was littering on Vliet Street at the place alleged by the city. In fact counsel for petitioner themselves admit that the petitioner was convicted of having distributed the literature in a manner such that street littering resulted (p. 17 of brief for petitioner).

III.

Rebuttal.

Decisions relied upon by petitioner do not disclose a conflict of authority.

People vs. Armstrong, 73 Mich. 288, 41 N. W. 275, found on page 12 of petitioner's brief, involved the distribution of Y. M. C. A. circulars. In that case there was no littering of the streets by the handbills. The case of *C. I. O. vs. Hague*, 25 F. Supp. 127, found on page 13 of petitioner's brief is not in point because in that case the mayor attempted to act as sole arbiter as to what persons should have the right to distribute circulars or to conduct meetings in Jersey City, and the right to circularize handbills or to conduct meetings was dependent upon the mayor's approval of such meeting or handbill.

The City of Milwaukee is not interested as to the contents of the circulars but rather pertains to the form of the leaflet and the facility with which its distribution generally and usually results in the clattering up and clogging of sewers, and cluttering up of streets resulting from the accumulation of waste material on the streets of the City of Milwaukee and presenting a distinct fire hazard.

The purpose of the Milwaukee ordinance was entirely lawful in that it is aimed solely and directly at preventing the littering of the streets of the city.

CONCLUSION.

There can be no question but that the handbill ordinance of the City of Milwaukee, Section 865 of the Milwaukee Code of 1914, is constitutional and valid and the method of its enforcement is a valid method.

It is therefore respectfully submitted that the ordinance being a valid regulation passed under ample authority, the method of its enforcement constitutes a reasonable exercise of the police power of the municipality and that the judg-

ment of conviction and the complaint should be both sustained.

Respectfully submitted,

WALTER J. MATTISON,
Counsel for Respondent,
City of Milwaukee.

FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1939.

No. 18.

HAROLD F. SNYDER,

Petitioner,

AGAINST

CITY OF MILWAUKEE,

Respondent.

BRIEF FOR AMERICAN CIVIL LIBERTIES UNION, INC., AS AMICUS CURIAE.

AMERICAN CIVIL LIBERTIES UNION, INC.,
Amicus Curiae.

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INDEX.

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CITY OF MILWAUKEE,
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Brief for American Civil Liberties Union, Inc., as *Amicus Curiae.*

The American Civil Liberties Union, Inc., submits this brief because of its interest in the question of free speech raised herein.

There can be no difference of opinion on the proposition that it is essential to the functioning of democracy that there be preserved the right of all persons not only freely to express their opinions, but also to circulate written expression of opinion. It appears to us that, although ostensibly the ordinance involved in this case purports to prevent the littering of the streets, its effect is to suppress the free dissemination of opinion.

Since young movements and minority groups are ordinarily impecunious, they must rely largely on the handbill, distributed without cost, to give publicity to their views. To suppress the distribution of the handbill would, there-

fore, be unfair to those who cannot afford to express themselves in any other manner.

The facts are covered in the briefs of the parties.

POINT I.

Appellant's conviction was without due process of law, since it was in violation of his right of freedom of speech and of the press.

This Court has recently held in the case of *Lovell* v. *Griffin*, 303 U. S. 444, 82 L. E. 660 (opinion by the Chief Justice), that an ordinance of the City of Griffin which banned the distribution of circulars or other literature without a permit from a City Manager, was invalid as a violation of the fundamental personal rights and liberties protected by the Fourteenth Amendment.

Now comes the City of Milwaukee and seeks to do by indirection what it cannot do directly.

By embellishing its ordinance with the trimmings of a police power statute which on its face expresses a desire to keep the streets clean, the respondent attacks the foundations of one of the basic American liberties, a free press. But, as was pointed out in *Lovell* v. *Griffin, supra* (at p. 452), where an attempt was made to distinguish between the use of the words "distribution" and "publication," the latter being concededly under the protection of the Constitution:

> "The ordinance cannot be saved because it relates to distribution and not to publication. 'Liberty of circulating is as essential to that freedom as liberty of publishing; indeed, without the circulation, the publication would be of little value.'. *Ex parte Jackson*, 96 U. S. 727, 733."

The City of Milwaukee gives to "distribution" the new name of "littering" and seeks thereby to achieve the same forbidden end. Nor does it limit its ban to commercial literature, which might have been within its rights. (See *People* v. *Johnson*, 117 Misc. [N. Y.] 133, 191 N. Y. S. 750 [1921]; *Coughlin* v. *Sullivan*, 100 N. J. L. 42, 162 A. 177 [1924]).

It is contended that the prohibition here, because it bans all distribution, is not within the principle of *Lovell* v. *Griffin, supra,* since there distribution was permitted but a license was first required. But the ban here is even more inclusive.

This ordinance is so broad that the sale of newspapers or any other publications in the streets might come within its condemnation. What is there to prevent the police, if someone buys a newspaper, reads the headlines, and then drops the newspaper on the sidewalk, from arresting the newsboy who sold the paper? The logical implication of the ordinance makes the distribution of literature a crime, not because the distributor is thereby committing a crime, but because as a result of such distribution another individual, the recipient of the printed matter, may commit a crime by littering the streets. Distribution of every kind leads to a certain amount of littering. The effect of such an ordinance, therefore, might be to prohibit distribution of material of a minority political party.

POINT II.

Petitioner's conviction should be set aside because the ordinance has been enforced in a discriminatory manner.

The evidence shows that not the litterers themselves, but only the distributors of the handbills were arrested (R., 9, 11, 14).

This shows the discrimination in the enforcement of the ordinance. It has been repeatedly held by this Court, as stated in *C. B. & Q. R. Co.* v. *City of Chicago*, 166 U. S. 226, 233, *et seq.*, 17 Sup. Ct. 581, that

> "A valid law may be wrongfully administered by officers of the state so as to make such administration an illegal burden and exaction upon the individual."

CONCLUSION.

It is respectfully submitted that the judgment of conviction should be reversed and the complaint dismissed.

Respectfully submitted,

American Civil Liberties Union, Inc.,
Amicus Curiae.

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